DOCKET

SUPREME COURT
OF THE UNITED STATES

No. 09-6338
Title: Percy Dillon, Petitioner
v.
United States
Docketed: September 9, 2009
Lower Ct: United States Court of Appeals for the Third Circuit
Case Nos.: (08-3397)
Decision Date: June 10, 2009
Questions Presented

~~Date~~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~
Sep 1 2009	Petition for a writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due October 9, 2009)
Sep 15 2009	Waiver of right of respondent United States to respond filed.
Sep 24 2009	DISTRIBUTED for Conference of October 9, 2009.
Sep 30 2009	Response Requested . (Due October 30, 2009)
Oct 19 2009	Order extending time to file response to petition to and including November 30, 2009.
Oct 30 2009	Brief of respondent United States in opposition filed.
Nov 10 2009	DISTRIBUTED for Conference of November 24, 2009.
Nov 30 2009	DISTRIBUTED for Conference of December 4, 2009.
Dec 7 2009	Motion to proceed in forma pauperis and petition for a writ of certiorari GRANTED.
Jan 4 2010	SET FOR ARGUMENT ON Tuesday, March 30, 2010.
Jan 19 2010	The time within which to file the joint appendix and petitioner's brief on the merits is extended to and including January 22, 2010.
Jan 21 2010	The time within which to file the joint appendix and petitioner's brief on the merits is further extended to and including January 25, 2010.
Jan 25 2010	Brief of petitioner Percy Dillon filed.
Jan 25 2010	Motion for leave to file Volume II of the joint appendix under seal filed by petitioner Percy Dillon.
Jan 25 2010	Joint appendix filed.
Jan 27 2010	Brief amicus curiae of Washington Legal Foundation filed.
Feb 1 2010	Brief amici curiae of Federal Public and Community Defenders, et al. filed.
Feb 3 2010	Motion DISTRIBUTED for Conference of February 19, 2010.
Feb 12 2010	CIRCULATED.
Feb 16 2010	Motion DISTRIBUTED for Conference of February 26, 2010.

Feb 17 2010	Record received from U.S.C.A. for 3rd Circuit. (1 envelope)
Feb 24 2010	Brief of respondent United States filed. (Distributed)
Mar 1 2010	Motion for leave to file Volume II of the joint appendix under seal GRANTED.
Mar 2 2010	Record received from U.S.D.C. for Western District of Pennsylvania. (1 box) There are sealed documents in this record.
Mar 3 2010	Brief amicus curiae of United States Sentencing Commission filed. (Distributed)
Mar 17 2010	Reply of petitioner Percy Dillon filed. (Distributed)
Mar 29 2010	Justice Alito is recused in this case.
Mar 30 2010	Argued. For petitioner: Lisa B. Freeland, Federal Public Defender, Pittsburgh, Pa. For respondent: Leondra R. Kruger, Assistant to the Solicitor General, Department of Justice, Washington, D. C.

PETITION FOR WRIT OF CERTIORARI

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2008 TERM

PERCY DILLON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, Percy Dillon, pursuant to Title 18, United States Code, Section 3006A(d)(6) and Rule 39 of the United States Supreme Court, asks leave to file the attached Petition or Writ of Certiorari without prepayment of costs, and to proceed in forma pauperis. Pursuant to an appointment under the Criminal Justice Act of 1964, as amended, the Federal Public Defender's Office was appointed to represent the Petitioner in the United States District Court for the Western District of Pennsylvania and in the United States Court of Appeals for the Third Circuit.

DATED: September 1, 2009

Respectfully submitted,
LISA B. FREELAND
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Assistant Federal Public Defender
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BEST AVAILABLE COPY

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER 2008 TERM

PERCY DILLON,
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v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

I. Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.

II. Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those appearing in the caption to this petition.

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IN THE SUPREME COURT OF THE UNITED STATES
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v.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Percy Dillon respectfully petitions the Court for a writ of certiorari to review the decision of the United States Court of Appeals for the Third Circuit.

OPINION AND ORDER BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Appendix 1a) is published at 572 F.3d 146.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on June 10, 2009.

Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254(1), which grants the United States Supreme Court jurisdiction to review by writ of certiorari all final judgments of the courts of appeals. Jurisdiction is also conferred upon this Court by 28 U.S.C. § 1651(a), which grants the United States Supreme Court jurisdiction to issue

all writs necessary or appropriate in aid of its respective jurisdiction and agreeable to the usages and principles of law.

The Petition for Writ of Certiorari is due September 8, 2009.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."

18 U.S.C. § 3553(a), provides in part:

> **Factors to be considered in imposing a sentence.**—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for—
>
> (A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—
>
> (i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, . . .

(5) any pertinent policy statement–(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, . . .

(6) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

18 U.S.C. § 3582, provides in part:

(b) **Effect of finality of judgment.**–Notwithstanding the fact that a sentence to imprisonment can subsequently be–
(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

(c) **Modification of an imposed term of imprisonment.**–The court may not modify a term of imprisonment once it has been imposed except that–. . .

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant . . . , the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such reduction is consistent with applicable policy statements issued by the Sentencing Commission. . .
.

28 U.S.C. § 991(b), provides in part:

> The purposes of the United States Sentencing Commission are to–
>
> (1) establish sentencing policies and practices for the Federal criminal justice system that–
>
> (A) assure the meeting of purposes of sentencing set forth in section 3553(a)(2) of title 18, United States Code;
>
> (B) provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices; and
>
> (C) reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process; . . .

28 U.S.C. § 994, provides in part:

> (o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. . . .
>
> (u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced. . . .

U.S.S.G. § 1B1.10 (2007), provides in part:

> Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)
>
> (a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines manual listed in

subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.

(b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Amendments covered by this policy statement are listed in Appendix C as follows: . . . 505 . . . .

Commentary

Application Notes:

1. Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.

2. In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine

whether, and to what extent, to reduced a term of imprisonment under this section. . . . .

Background: . . .

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

Before Amendment 706, the sentencing guidelines provided that any defendant responsible for 1.5 kilograms or more of crack cocaine would be sentenced under base offense level 38. After Amendment 706, defendants responsible for at least 1.5 kilograms but less than 4.5 kilograms are sentenced under level 36. U.S.S.G. § 2D1.1(c)(2). *See* U.S.S.G. § 2D1.1 (2007); U.S.S.G. Supp. to App'x C, Amend. 706. Amendment 706 was made retroactive, effective March 3, 2008. U.S.S.G. § 1B1.10(c).

STATEMENT OF THE CASE

This case presents a pressing issue concerning the administration of criminal justice across the country, over which the federal courts are openly divided: whether the Federal Sentencing Guidelines are binding when a revised guideline range causes a district court to impose a new sentence pursuant to 18 U.S.C. § 3582. The United States Court of Appeals for the Third Circuit held that they are, in fact, binding.

1. In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the Federal Sentencing Guidelines violate the Sixth Amendment when they require courts to increase defendants' sentences above otherwise binding limits based on facts not proven to a jury beyond a reasonable doubt. The Court rendered the Guidelines advisory to cure this constitutional infirmity.

The Court followed *Booker* with *Kimbrough v. United States*, 128 S. Ct. 558 (2007), which confirmed district courts have discretion to deviate on "policy" grounds from guidelines ranges applicable to crack cocaine offenders. In *Spears v. United States*, 129 S. Ct. 840 (2009) (per curiam), this Court reaffirmed *Kimbrough's* holding that the crack guidelines, "'like all other Guidelines, are advisory only.'" *Id.* at 842 (quoting *Kimbrough*, 128 S. Ct. at 560).

2. Part of the original Sentencing Reform Act, 18 U.S.C. § 3582(c)(2), permits a defendant to make a motion for relief when the Sentencing Commission has amended the guidelines range applicable to that defendant's offense and made the amendment retroactive. Some courts call such proceedings "resentencing[s]," *e.g.*, *United States v. Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007), and others call them sentence "modification[s]" or "reduction[s]," *e.g.*, *United States v. Rhodes*, 549 F.3d 833, 839-40 (10th Cir. 2008). Regardless of the label applied, Section 3582(c)(2) directs courts to determine whether revisiting a defendant's sentence in light of a revised guidelines range would be consistent with applicable policy statements issued by the Sentencing Commission. Courts that grant a Section 3582 motion recalculate the defendant's guideline range from the ground up using the "retroactive" guidelines. U.S. SENTENCING GUIDELINES MANUAL [hereinafter U.S.S.G.] § 1B1.10(c) & cmt. n.1(B)(i)-(iii) (2008). They then impose a "New Term of Imprisonment," that replaces the old one *nunc pro tunc*.

The day after *Kimbrough* issued, the Sentencing Commission revisited its policies relating to retroactive guidelines. Specifically, it promulgated a new policy statement "clarifying when, and to what extent, a sentencing reduction is considered consistent with the policy statement and

therefore authorized under 18 U.S.C. § 3582(c)(2)."[1] The new policy statement, save for an exception not relevant here, prohibits district court judges from imposing a new sentence in a Section 3582(c)(2) proceeding that is "less than the minimum term of imprisonment provided by the amended guideline range." U.S.S.G § 1B1.10 cmt. n.3.[2]

3. Petitioner Percy Dillon is one of thousands of federal prisoners who has been affected by those amendments to the Guidelines.

When he was just 23 years old and while he himself was suffering from a drug problem and using crack cocaine, Percy Dillon became involved in an ongoing crack cocaine conspiracy. App. 102, 152a, PSR ¶60.[3]

After awarding a 2-level reduction for acceptance of responsibility and determining that Mr. Dillon fell within Criminal History Category II, the district court found the offense level to be 38 and the then mandatory guideline range

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[1]United States Sentencing Commission, Federal Register Notices, http://www.ussc.gov/NOTICE.HTM.

[2]The amended policy statement permits judges to sentence a defendant below the amended guidelines range only if the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing." U.S.S.G. § 1B1.10 cmt. n.3.

[3]"App." refers to Appendix filed in the Third Circuit Court of Appeal. "PSR" refers to Presentence Report.

to be between 262 and 327 months.[4] The court imposed the lowest possible sentence within the range, or 262 months. It also imposed a consecutive 60 month sentence for use of a firearm during and in relation to drug trafficking under §924(c)(1). The total sentence for this, Percy Dillon's first felony offense, was 322 months, or 26 years, 10 months incarceration.

This incredibly harsh range applied despite the fact that Mr. Dillon had a minor criminal history. Percy had *no* juvenile criminal history and two minor *misdemeanor* convictions. PSR ¶¶44-47.

In 2007, the Sentencing Commission revised the guidelines applicable to crack cocaine offenses. Prior to the amendments, the Guidelines treated one gram of crack cocaine as equivalent to 100 grams of powder cocaine in assigning guidelines ranges for cocaine offenses. Recognizing that the

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[4]At age 20, Percy pled guilty to obstructing/resisting arrest in California. PSR ¶47. The Presentence report indicates a **suspended** sentence was imposed, 2 years' probation, credit for 2 days' time served. PSR ¶47. It further indicates Percy was placed in a 6-month diversion program, which he successfully completed on December 20, 1990. PSR ¶47. Yet the probation officer improperly assessed Percy one point. *See* Part II, *infra*.

This incorrectly assessed second criminal history point increased Mr. Dillon's criminal history category from Criminal History Category I to Category II and correspondingly increased the then mandatory guideline range from 235 to 293 months to 262 to 327 months.

100:1 ratio produced an "urgent and compelling problem" that "significantly undermine[d]" Congress's purposes in enacting the Sentencing Reform Act, the Commission reduced the applicable ratio to 20:1, which in turn reduced the base offense level for all crack cocaine offenses by two levels. U.S.S.G. app. C, at 221 (2008). The Commission made this amendment retroactive as of March 3, 2008. See U.S.S.G. § 1B1.10(c); 73 Fed. Reg. 217 (Jan. 2, 2008).

Acting on this amendment, in December, 2007, Mr. Dillon filed a *pro se* Motion for Sentence Reduction under 18 U.S.C. §3582(c)(2), seeking a 2-level reduction under the amendments as well as a sentence reduction greater than two levels based on the sentencing factors found at 18 U.S.C. §3553(a) - - arguing under *Booker* that the district court should treat the revised guidelines range as only advisory. App. 109-115, 131-147, citing among other factors, his education and vocational training, his creation of a Prison Outreach program with the University of California, Berkeley and including supporting documentation. *See also* App. 192-93.

The district court issued a memorandum opinion and order granting in part and denying in part Mr. Dillon's *pro se* motion for sentence reduction. Appendix 2a. The court lowered the offense level by 2 to 36. The new guideline range was 210 to 262 months, plus the mandatory 60-month consecutive

sentence, resulting in a sentence to 270 months. Appendix 2a. But the court determined that it lacked jurisdiction to grant anything beyond the 2-level reduction authorized by the amendment. *Id.* The district court concluded that the revised policy statement of §1B1.10 precluded any additional reduction. *Id.*

4. Mr. Dillon appealed, and the Third Circuit affirmed. The Third Circuit conceded "[i]f *Booker* did apply in proceedings pursuant to § 3582, **Dillon would likely be an ideal candidate for a non-Guidelines sentence.**" *Dillon*, 572 F.3d at 147 (bold added). But the Third Circuit held "*Booker* does not apply to the size of a sentence reduction that may be granted under § 3582(c)(2)." *Id.*, 572 F.3d at 147.

The Third Circuit concluded that "[b]ecause § 3582(c)(2) proceedings may only reduce a defendant's sentence and not increase it, the constitutional holding in Booker does not apply to § 3582(c)(2)." *Id.*, 572 F.3d at 149. Further, the Court determined that "*Booker* applies to full sentencing hearings. . . but not to sentence modification proceedings under §3582(c)(2)." *Id.*, 572 F.3d at 149. It found telling that *Booker* did not mention §3582(c)(2) and was therefore not affected by *Booker*. *Id.* "Because U.S.S.G §1B1.10 is binding on the District Court pursuant to §3582(c)(2), the District Court correctly concluded that it lacked the authority to

further reduce the Appellant's sentence." *Id.*, 572 F.3d at 149.

It noted it was following the majority of its sister circuits, while acknowledging the conflicting authority of the Ninth Circuit in *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007).

The Third Circuit also rejected Mr. Dillon's argument that the district court had committed procedural error requiring remand by failing to correctly calculate his criminal history score, asserting "the District Court had no authority to reconsider its prior criminal history determination." *Dillon*, 572 F.3d at 150.

REASONS FOR GRANTING THE WRIT

Federal courts across the country are divided over whether federal district courts must treat amended sentencing guidelines ranges as binding when imposing new sentences under 18 U.S.C. § 3582, or whether this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005), requires that they be treated as only advisory. This question is important and arises frequently, particularly in the context of the amended guidelines for crack cocaine offenses. This is such a case and is an ideal vehicle for resolving the split of authority.

The Third Circuit's holding that district courts must treat the Guidelines as binding in 18 U.S.C. § 3582 proceedings also is wrong. This Court held in *Booker* that the Guidelines violate the Sixth Amendment when they require a longer sentence than is otherwise allowed based on the elements of the crime of conviction. *Id.* at 244. Such is the case here. Furthermore, treating the Guidelines as binding when constructing a new sentence flouts *Booker's* mandate that binding guidelines are "no longer an open choice." *Booker*, 543 U.S. at 263; *accord Spears v. United States*, 129 S. Ct. 840, 842 (2009) (per curiam) (Guidelines are "advisory only") (quoting *Kimbrough v. United States*, 128 S. Ct. 558, 560 (2007)).

It is no answer to claim, as the Third Circuit does and the Sentencing Commission suggests, that proceedings under Section 3582 do not constitute "full" resentencings. *Dillon*, 572 F.3d at 149. That is just a label. District courts impose new sentences under Section 3582 the same way they conduct other resentencings. And whenever a court reopens a sentence and constructs a new one, it must do so in accordance with the law that exists at the time the new sentence is imposed, not just with (retroactive) sentencing guidelines. *Booker* is the law; this Court should instruct the federal courts of appeals again that they must follow it.

IA. Federal Courts Are Divided Over Whether Sentencing Guidelines Ranges Are Binding In Section 3582 Proceedings.

Recent retroactive amendments to the Federal Sentencing Guidelines, particularly the recent amendment to the crack cocaine guidelines under U.S.S.G. § 1B1.10, have given rise to thousands of new sentences under Section 3582. In the wake of *Booker*, the federal courts have become sharply divided over whether the directives in U.S.S.G. § 1B1.10 validly preclude district court judges from imposing such new sentences below the revised guidelines ranges. This division of authority is ripe for this Court's review.

1. Seven Federal Courts of Appeals Require Courts to Treat Amended Guidelines Ranges as Binding When Imposing New Sentences under Section 3582.

In this case, the Third Circuit held that district courts may not sentence defendants in Section 3582 proceedings below the bottom ends of their applicable guidelines ranges. The Third Circuit asserted that because § 3582(c)(2) proceedings may only reduce and not increase a defendant's sentence, *Booker's* Sixth Amendment holding does not apply to §3582(c)(2). *Dillon*, 572 F.3d at 149. It continued, *Booker's* remedial holding only applies to full sentencing hearings, not sentence modification proceedings under §3582(c)(2). *Id.*

Seven other federal courts of appeals have similarly held that U.S.S.G. § 1B1.10 restricts district courts' discretion to reduce sentences in Section 3582 proceedings. *See United States v. Fanfan*, 558 F.3d 105 (1st Cir. 2009), *petition for certiorari filed* May 15, 2009 (No. 08-10503); *United States v. Savoy*, 567 F.3d 71 (2d Cir. 2009) *(per curiam)*; *United States v. Dunphy*, 551 F.3d 247 (4th Cir. 2009), *cert denied*, 129 S.Ct. 2401; *United States v. Cunningham*, 554 F.3d 703 (7th Cir. 2009), *cert denied*, 129 S.Ct. 2826; *United States v. Starks*, 551 F.3d 839 (8th Cir. 2009), *cert. denied*, 129 S.Ct. 2746; *United States v. Rhodes*, 549 F.3d 833 (10th Cir. 2008), *cert. denied*, 129 S.Ct. 2052; *United States v. Melvin*,

556 F.3d 1190 (11th Cir. 2009), *cert. denied*, 129 S.Ct. 2382.

Two of these decisions have triggered judges sitting on subsequent panels to register their disagreement. *See United States v. Harris*, 556 F.3d 887 (8th Cir. 2009) (Bye, J., concurring); *United States v. Pedraza*, 550 F.3d 1218 (10th Cir. 2008) (McKay, J., dissenting).

A district court in the Tenth Circuit also recently expressed disagreement with *Rhodes*: "While I believe the Tenth Circuit's view runs contrary to better reasoned decisions interpreting § 3582(c)(2) in real time to encompass *Booker* and its progeny, resolution of that conflict must wait for another day and a higher court. [T]he analyses set forth in *United States v. Ragland*, 568 F.Supp.2d 19 (D.D.C.2008) and *United States v. Hicks*, 472 F.3d 1167 (9th Cir.2007) remain the better reasoned. . . ." *United States v. Jones*, 606 F.Supp.2d 1293, 1294-95 (D.Colo.2009).

2. The Third Circuit did acknowledge the conflicting authority of the Ninth Circuit. In *United States v. Hicks*, 472 F.3d 1167 (9th Cir. 2007), the Ninth Circuit held that district courts are permitted in Section 3582 proceedings to impose new sentences below amended, retroactive guidelines ranges. The Ninth Circuit concluded that to the extent that the Sentencing Commission's policy statements require district courts to treat amended guidelines ranges as

binding, those statements run afoul of *Booker*, and must therefore "give way." *Id.* at 1173.

Two federal district courts in circuits yet to weigh in on the issue also have concluded that courts must be permitted in Section 3582 proceedings to impose new sentences below the amended guidelines ranges. *See United States v. Blakely*, 2009 WL 174265 (N.D. Tex. 2009); *United States v. Ragland*, 568 F.Supp.2d 19 (D.D.C. 2008).[5] Furthermore, Judge Lynch of the Southern District of New York has observed that "it would be, to say no more, ironic if the relief available to a defendant who received a sentence that is now recognized to have been unconstitutional because imposed under mandatory guidelines based on non-jury fact findings and unwise because the guideline under which he was sentenced was excessively severe, can be limited by a still-mandatory guideline." *United States v. Polanco*, No. 02 Cr. 442-02(GEL), 2008 WL 144825, at *2 (S.D.N.Y. Jan. 15, 2008).

Finally, as noted above, judges in the Eighth and Tenth Circuits have noted that they disagree with decisions allowing the Guidelines to be treated as binding in Section 3582 proceedings. In the Eighth Circuit, Judge Bye has argued that "§ 1B1.10 cannot restrict a resentencing court's

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[5]The government filed a notice of appeal in *Ragland*, but later moved to dismiss its appeal. *See* Order, *United States v. Ragland*, No. 08-3092 (D.C. Cir. Nov. 7, 2008).

discretion to sentence outside of the amended guidelines range because it is, like all of the Guidelines, advisory under *United States v. Booker*." *Harris*, 2009 WL 465945, at *2 (Bye, J., concurring). In the Tenth Circuit, Judge McKay has contended that, under Booker, trial courts should not "feel constrained to treat the bottom of the amended guidelines range as a mandatory floor." *Pedraza*, 550 F.3d at 1223 (McKay, J., dissenting).

3. This conflict has been well ventilated, and the time has come for this Court to step in. *See Jones*, 606 F.Supp.2d at 1294 (D.Colo.2009) ("While I believe the Tenth Circuit's view runs contrary to better reasoned decisions interpreting § 3582(c)(2) in real time to encompass *Booker* and its progeny, resolution of that conflict must wait for another day and a higher court.").

The split also is causing unwarranted sentencing disparities across the country. While several circuits now forbid below-guidelines sentences in Section 3582 proceedings, district courts throughout the Ninth Circuit - where over 500 crack offenders alone are eligible for resentencing[5] - are following *Hicks* and imposing

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[5]Memorandum Analyzing the Impact of the Crack Cocaine Amendment If Made Retroactive from Glenn Schmitt, Lou Reedt, and Kenneth Cohen to Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n 15 tbl.3 (Oct 3, 2007) [hereinafter Impact Memorandum].

below-guidelines sentences for some offenders. *See, e.g.*, *Order, United States v. Fox*, No. 3:96-cr-00080 JKS, at 6-8 (D. Alaska Nov. 20, 2008) (giving defendant new sentence more than eleven years lower than revised guidelines range); *see also United States v. Thigpen*, CR 92-749 SVW, 2008 WL 4926965, at *2 (C.D. Cal. Nov. 12, 2008) (noting district courts' authority to impose below-guidelines sentences); *United States v. Mitchell*, No. CR92-1317 FDB (JET), 2008 WL 2489930, at *1 (W.D. Wash. June 19, 2008) (same). The same is true in the District of Columbia and the Northern District of Texas, *see supra*, at 10, where over 600 crack offenders are eligible for resentencing. Impact Memorandum, *supra*, at 14 tbl.2.

B. The Confusion Over The Question Presented Significantly Impacts The Administration Of Criminal Justice.

1. The question presented here affects a large number of individuals. The Sentencing Commission has rendered twenty-seven amendments retroactive, *see* U.S.S.G. § 1B1.10(c), making defendants convicted of a variety of crimes – including drug trafficking, fraud, weapons offenses, and various forms of theft – eligible for modified sentences under Section 3582. *See id.* app. C (describing amendments to the Guidelines).

According to the Sentencing Commission, the retroactive application of Amendment 706 alone made approximately 19,500

offenders eligible for reduced sentences. *See* Memorandum Analyzing the Impact of the Crack Cocaine Amendment If Made Retroactive from Glenn Schmitt, Lou Reedt, and Kenneth Cohen to Ricardo Hinojosa, Chair, U.S. Sentencing Comm'n 4-5 (Oct. 3, 2007) [hereinafter Impact Memorandum].

Between March 3, 2008, when Amendment 706 became retroactive, through January 21, 2009, district courts granted 12,723 motions under Section 3582 for new sentences. U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.1 (2009). Given the uncertainty concerning *Booker's* applicability to Section 3582 proceedings, many of these decisions are presumably on appeal right now.

2. It also is important to recognize that the question presented is not a "transitional" issue affecting only defendants who were initially sentenced prior to *Booker*. Section 1B1.10 applies equally to defendants initially sentenced in the post-*Booker* world, creating the perverse effect of binding defendants sentenced today to the amended guidelines ranges established for their offense if they later become eligible for new sentences under Section 3582. For example, according to the Sentencing Commission, 7,187 defendants were sentenced for crack offenses after *Booker* but before Amendment 706 took effect. *See* Impact Memorandum,

supra, at 5. So long as the decisions such as the Third Circuit's remain law, these and other defendants eligible for sentence reductions will be subjected to binding applications of the Guidelines if they seek modifications under Section 3582. See U.S.S.G. § 1B1.10(b)(2)(A).

C. This Case Is An Excellent Vehicle For Considering The Question Presented.

1. The Third Circuit agrees "[i]f Booker did apply in proceedings pursuant to § 3582, **Dillon would likely be an ideal candidate for a non-Guidelines sentence.**" *Dillon*, 572 F.3d at 147 (emphasis added).

When he was just 23 years old and while he himself was suffering from a drug problem and using crack cocaine, Percy Dillon became involved in an ongoing crack cocaine conspiracy. App. 102, 152a, PSR ¶60. He was sentenced to 26 years and 10 months for this, his first felony offense.

At sentencing, the district court expressed distaste for the severe sentence it was required to impose under the then mandatory guidelines system: "Mr. Dillon, the United States Sentencing Guidelines allow me to sentence you to a term imprisonment ranging from 322 to 387 months. I chosen to sentence you to the minimum possible under the range provided by the Guidelines. The crimes you were convicted of are very serious crimes, however, **I personally don't believe that you should be serving 322 months. But I feel I am bound**

by those Guidelines and I don't feel there is any grounds for, which can depart from those Guidelines." App. 98-99. The court believed the sentence was not fair and "entirely too high": "I don't say to you that these penalties are fair. I don't think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime." App. 99, 158.

In its statement of reasons, the district court again expressed regret that its hands were tied and it was bound to follow the unfair range: "While the Court considers the defendant's offenses serious, **it also believes that the guidelines range is unfair to the defendant. The Court, however, is bound by the guidelines range.** Therefore, this Court sentenced the defendant to the minimum of the guidelines range." App. 5.

On another occasion, the district court acknowledged that by imposing the 26 year, 10 month sentence, "I was basically taking the rest of his life away." App. 157 (Docket Entry No. 193, Motion under §2255, Exhibit D-1). "I felt terrible about it" but was bound under the federal sentencing guidelines. App. 157. The court added "he believed whatever good prison might have done for Dillon - who he said came from a good family - **could be accomplished in five years**." *Id.*

Further, despite Mr. Dillon's minor criminal history he was placed in Criminal History Category II rather than I because of the parties' error.

At age 20, Percy pled guilty to obstructing/resisting arrest in California. PSR ¶47. The Presentence report indicates a **suspended** sentence was imposed, 2 years' probation, credit for 2 days' time served. PSR ¶47. It further indicates Percy was placed in a 6-month diversion program, which he successfully completed on December 20, 1990.[7] PSR ¶47. Yet the probation officer improperly assessed Percy one point. *See* Part II, *infra*.

This incorrectly assessed second criminal history point increased Mr. Dillon's criminal history category from Criminal History Category I to Category II and correspondingly increased the then mandatory guideline range from 235 to 293 months to 262 to 327 months.

It is not just the law of federal sentencing that has changed since 1993; this man has changed. *See United States v. Shelby*, 2008 WL 2622828, *5 (N.D. Ill. 2008).

The overarching theme of the many letters submitted to

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[7]An order was ultimately entered in October 1999 dismissing the complaint: "[D]efendant. . . having been admitted to probation, has fulfilled the conditions of probation. . . [is] permitted to withdraw the plea of guilty [and enter] a plea of not guilty, [and] . . . the accusatory pleading is dismissed". App. 132-33.

the district court was that Percy Dillon was an immature kid (who was himself abusing drugs) when he committed the crime who has since matured into an intelligent and responsible young man. App. 101-08, 151-52, 154-56, 159, 163, 150 (asking court to consider "imperfect spirit of man, that allows us all to grow and appreciate life"). He continues to strive daily to achieve educational goals and to give back to society upon his return. *See, e.g.*, App. 148-50, 150a-b, 154.

Over the past 15 years of incarceration, Percy Dillon has become a leader and organizer and proven himself to be an extraordinary man, working to educate himself, other inmates, and the community.

Incredibly, Mr. Dillon reached out from prison to the University of Berkeley California to instigate the creation of an African American Studies program for prisoners. App. 150a-b, 151-52.

In June 2003, Mr. Dillon contacted the University of California, Berkeley, African American Studies Department, "inquiring about educational programs or resources that the Department may have or be willing to create for African Americans who are incarcerated. He specifically [sought] faculty or staff who would be interested in teaching a class, or lecturing in a class that was of a topic related to

African American Studies, in . . . USP Atwater. He was very thorough in his request and gave suggestions and ideas on how we could collaborate, if we were interested and enclosed a syllabus from a class he completed at USP Atlanta, while incarcerated in [there]. . ." App. 150a.

Mr. Dillon collaborated with Lindsey Herbert, B.A., M.A., Academic Counselor, African American and African Diaspora Studies at Berkeley. "Mr. Dillon was the main connection inside the institution and he work[ed] vehemently to get events organized and classes started so that our program could get off the ground. **Without his insight and advice our program would not have succeeded and grown the way it has.**" App. 150a-b.

He has been the impetus behind other educational programs as well. One of his efforts involves Hunters Point Family, a youth development agency for "high-risk" youth serving over 200 youth living in public housing and 800 community members. App. 148. This organization offers parental support groups, a farmers market, a certified organic farm, youth businesses, food pantries, and summer camps. Id. Over ninety-eight percent of the participants are African American. Id. Mr. Dillon "sought to help the agency to establish quality educational programs, through U.C. Berkeley and San Francisco State's African American studies

programs. [Again,] Mr Dillon contacted various professors and ascertained their syllabi and other course material in order to assist [the Hunters Point Family] staff to develop an African American studies program within the agency, to educate our youth about their rich heritage and uplift them. The program has been very successful and continues today as part of our Young Men's Leadership Institute." App. 148-50.

The founder and Executive Director of Hunters Point Family sees Mr. Dillon as a mentoring figure who can reach out to young blacks and motivate them by sharing his experiences. App. 149-50. Percy "realized that his true restitution must be made and paid to the African-American community, his community. P.D. has been evolving into a positive example of a strong African American man and as asset to his community." App. 149. *See also* App. 156a (Percy Dillon's nephew explaining that it was his uncle who encouraged him to persevere and to complete college, offering his experience up as a cautionary tale). He encourages juvenile inmates at Pike County Juvenile Detention Center to follow a different path. App. 156. He is eager "to help other young men in the community understand his perils and hopefully reach some before they fall victim." App. 152a-b.

Tracey D. Ramirez, Financial Management Analyst at Stanford University and long time friend opined, "During the

previous fifteen years of incarceration Mr. Dillon has absolutely changed his frame of mind, and continues to strive to improve personally while imprisoned. His aim of encouraging and motivating the generation that precedes him is relentless. . . . He has worked effortlessly to redeem himself, using these years of incarceration as the catapulting force towards his restitution." App. 151.

Amazingly, Mr. Dillon is now a published writer. An interview he conducted and edited was published in the University of California's Department of African American Studies Newsletter, The Diaspora. App. 150a. "Mr. Dillon continues to practice his skills with writing political commentary and creating proposals for both youth and adult classes that would be cultural, spiritual and educations, for community members on the outside." *Id. See also* App. 151-52. He has also helped start a prison newsletter and it currently working on a greeting card line. App. 159.

Not only has Mr. Dillon striven to educate fellow inmates, at risk youth, and the community at large, he has also taken advantage of opportunities to further his own education.

Obtaining a GED was just his first step. He graduated in 2004 from the School of Business, Property Management, through Ashworth University, a nationally accredited member

of The Distance Education and Training Council. App. 134-36, 138.

He has been attempting to learn skills that will help him succeed and earn a living outside of prison. For example, he successfully completed Custodial Maintenance Programs. App. 139-40. He successfully completed training for Carpet and Upholstery Care, Rest Room Care, Floors and Floor Care Equipment, Cleaning Chemicals, Maintaining Floors and Other Surfaces. App. 142-44. He received certificates for successfully completing a course of study in Industrial Safety and Health. App. 141.

Inmate Education Data submitted by Mr. Dillon reflect the numerous classes he has successfully completed in for example, victim awareness, fitness training, and parenting. Further, he has obtained Certificates of Achievement in Cultural Diversity/African American Studies and Nile Valley Civilization, and Empowerment and Economic Justice. App. 145-47.

Despite the passage of 15 years, Percy's family remain firmly at his side. He even has job prospects awaiting him. App. 161, 152b.

Several of those who have collaborated with Mr. Dillon expressed fear that at some point, continued incarceration

would hamper, not further, the goals of rehabilitation:[8] "Living in prison, around criminally-minded people is no longer beneficial to Mr. Dillon, in fact it is detrimental." App. 150b, 150 (expressing fear that additional incarceration will cause him to become institutionalized, bitter and cynical).

D. The Third Circuit's Opinion in Incorrect

1. Treating The Guidelines As Binding In A Section 3582 Proceeding Violates The Sixth Amendment.

A. *United States v. Booker* prohibits treating a sentencing guideline range as binding when it exposes an offender to a longer sentence than is otherwise permissible based on the facts found by the jury. 543 U.S. 220, 232-35 (2005). The Third Circuit's opinion condones just that result.

B. The Third Circuit conceded *Booker* applies to "full

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[8]Rehabilitation was not taken into account in formulating the guidelines, other than requiring judges to assess the need for training and treatment in imposing conditions of probation or supervised release. United States Sentencing Commission, Fifteen Years of Guidelines Sentencing: An Assessment of How Well the Federal Criminal Justice System is Achieving the Goals of Sentencing Reform (hereinafter "Fifteen Year Report") (November 2004) at 13, available at http://www.ussc.gov/15_year/ 15year.htm. The "court, in determining whether to impose a term of imprisonment, and, if a term of imprisonment is to be imposed, the length of the term, shall consider the factors set forth in section 3553(a) to the extent that they are applicable, *recognizing that imprisonment is not an appropriate means of promoting correction and rehabilitation.*" 18 U.S.C. § 3582(a) (emphasis supplied).

sentencing hearings - whether in an initial sentencing or in a resentencing where the original sentence is vacated for error," but asserts it does not apply to "sentence modification proceedings under §3582(c)(2)." *Dillon*, 572 F.3d at 149.

The Third Circuit's holding rests on a "false . . . dichotomy." *See United States v. Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007). There is no practical difference between a Section 3582 proceeding and an ordinary resentencing hearing. In either case, a district court calculates a "New Offense Level" and a "New Criminal History Category" to yield a "New Guideline Range." Moreover, pursuant to the Commission's own policy statement, courts in Section 3582 proceedings, just as in any other resentencing proceeding, should craft a new sentence based in part on the factors listed in 18 U.S.C. § 3553(a), public safety implications, and even offenders' conduct in prison after imposition of their original sentences. U.S.S.G. § 1B1.10 cmt. n.1(B)((iii).

Regardless of how a Section 3582 proceeding is characterized, therefore, the effect of such a proceeding is the same as any other resentencing: the offender receives a new term of imprisonment. And when the right to jury trial is at issue, "label[s]" do not control; actual effects do. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 494 (2000); *see*

also Ring v. Arizona, 536 U.S. 584, 602 (2002) ("The dispositive question" in this area of law "'is one not of form, but of effect.'" (quoting *Apprendi*, 530 U.S. at 494)). Indeed, in this case, the only difference between the resentencing under Section 3582 and any other resentencing was that the district court bound itself by the applicable guidelines range. But that is exactly why the proceeding violated the Sixth Amendment.

To be sure, Congress generally is not obligated to require courts to reopen final judgments. But "there can be no expectation of finality in the original sentence" when Congress specifically provides that it is subject to further review, *United States v. DiFrancesco*, 449 U.S. 117, 139 (1980), or replacement, *see United States v. Caraballo*, 552 F.3d 6, 9 (1st Cir. 2008) (Section 3582 trumps finality objections); *United States v. Pedraza*, 550 F.3d 1218, 1220 (10th Cir. 2008) ("§ 3582(c)(2) . . . affords a narrow exception to the usual rule of finality of judgments."). Nor can Congress deny defendants constitutional protections simply because it confers a proceeding as "an act of grace." *Gagnon v. Scarpelli*, 411 U.S. 778, 782 n.4 (1973); *see also Evitts v. Lucey*, 469 U.S. 387, 401 (1985) (when Congress provides a means for challenging criminal convictions that it need not provide, Congress "must nonetheless act in accord

with the dictates of the Constitution"); *Graham v. Richardson*, 403 U.S. 365, 374 (1971) ("[T]his Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'").

Any holding to the contrary would raise serious separation of powers concerns. Building on the basic tenets of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803), this Court has emphasized that Congress may not confer jurisdiction on a federal court and then "direct that it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them." *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J. dissenting), cited with approval in *United States v. Sioux Nation*, 448 U.S. 371, 392 (1980). "[W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it." *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting); *see also Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987) (Congress may not pass a law and "then avoid judicial review of a broad category of constitutional challenges by individuals injured by the law"; courts "must apply all applicable laws in rendering their

decisions"). *See United States v. Jones*, 606 F.Supp.2d 1293, 1294-95 (D.Colo. 2009) ("Being forced to engage in the legal fiction of going back, in a post-Booker world, to a pre-*Booker* time to "substitute" a new Guideline in a mandatory fashion that has been constitutionally invalidated, reduces me to a ministerial flunky at best and, at worst, intrudes into Article III and violates the separation of powers doctrine.").

There is no law more fundamental than the Constitution. Requiring federal courts to treat the Guidelines as binding because Congress and the Sentencing Commission have labeled certain proceedings in which defendants are given new sentences as less than "full" resentencings infringes on the courts' duty to apply the Constitution in resolving cases and controversies. Indeed, the Second Circuit recognized in a similar context that a statute instructing the Sentencing Commission to specify a guidelines range for an offense cannot restrict the courts' authority to impose lower sentences for that offense. *See, e.g., United States v. Sanchez*, 517 F.3d 651, 663-65 (2d Cir. 2008).

C. Additionally, the Third Circuit reasoned that *Booker* does not apply to Section 3582 proceedings because such proceedings "may only reduce a defendant's sentence and not increase it. . . ." *Dillon*, 572 F.3d at 149. In practice,

however, Section 3582 proceedings operate as new sentencing hearings that recalculate defendants' sentences from scratch. And while such proceedings result in new sentences that "reduce" offenders' terms of imprisonment compared to the terms they originally received, 18 U.S.C. § 3582(c)(2), this does not change the fact that these new sentences are longer than would otherwise be allowed based solely on the elements of the crimes of conviction. Because the Sixth Amendment applies to the finding of any fact that is "legally essential to the punishment to be inflicted," *Harris v. United States*, 536 U.S. 545, 561 (2002), the application of judicially found facts in Section 3582 proceedings violates the Constitution. A previous, unconstitutional sentence cannot be used as a baseline for a new sentence.

2. Treating The Guidelines As Binding In A Section 3582 Proceeding Violates *Booker's* Remedial, Statutory Holding.

The *Booker* decision includes not just a constitutional ruling but also a new construction of the Sentencing Reform Act for all cases going forward. By forbidding district courts from deviating below amended guidelines ranges, U.S.S.G. § 1B1.10 improperly attempts to resurrect the binding guidelines scheme that *Booker* excised from the Sentencing Reform Act.

A. In *Booker*, the government urged this Court to render

the Guidelines advisory in some cases and to leave them binding in others. *Booker*, 543 U.S. at 265-67. This Court rejected that argument, holding that binding guidelines are "no longer an open choice." *Id.* at 263. This Court has specifically reaffirmed this holding twice with respect to crack offense guidelines, making clear that the Guidelines are "advisory only." *Spears v. United States*, 129 S. Ct. 840, 842 (2009) (per curiam) (quoting *Kimbrough*, 128 S. Ct. at 564).

In light of these holdings, the instruction in U.S.S.G. § 1B1.10 to treat amended guideline ranges as binding in Section 3582 proceedings must itself be treated as advisory. As Judge Bye put it, "§ 1B1.10 cannot restrict a resentencing court's discretion to sentence outside of the amended guidelines range because it is, like all of the guidelines [establishing sentencing ranges], advisory under *United States v. Booker*." *United States v. Harris*, 556 F.3d 887, 889 (8th Cir. 2009) (Bye, J., dissenting); *see also Hicks*, 472 F.3d at 1170.

Any other result would render U.S.S.G. § 1B1.10 invalid on its face. As this Court has made clear, directions in the Guidelines Manual are valid only insofar as they are consistent with federal statutory law. *Stinson v. United States*, 508 U.S. 36, 38 (1993). And the Sentencing Reform

Act, as modified by *Booker's* remedial holding, prohibits guidelines sentencing ranges from being treated as mandatory. Accordingly, to the extent there is an unavoidable conflict between the Act as modified and U.S.S.G. § 1B1.10, the latter must give way.

B. The Third Circuit stresses that *Booker* severed only Section 3553(b) and Section 3742 and did not mention Section 3582. *Dillon*, 572 F.3d at 149. But Section 3582 was not at issue in *Booker*. Even if it had been, this Court would not necessarily have had to sever any of it. Section 3582 compels constitutional violations only when combined with U.S.S.G. § 1B1.10. And the language in U.S.S.G. § 1B1.10's current policy statement rendering the Guidelines binding - "the court shall not reduce the defendant's term of imprisonment . . . to a term that is less than the minimum of the amended guideline range" - was not enacted until after *Booker* was decided. U.S.S.G. § 1B1.10(b)(2)(A) (emphasis added).[9]

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[9]In January 2005, when *Booker* was decided, the applicable policy statement read only: "In determining whether and to what extent a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced." U.S.S.G. § 1B1.10(b) (2004) (emphasis added).

II. BY REFUSING TO REQUIRE THE SENTENCING COURT TO START WITH A CORRECTLY CALCULATED GUIDELINES RANGE, THE THIRD CIRCUIT ISSUED AN OPINION IN CONFLICT WITH THIS COURT'S AS WELL AS ITS OWN PRECEDENT.

This Court has held that in reviewing sentences, appellate courts must first ensure that the district court committed no significant procedural error such as failing to correctly calculate or improperly calculating the guidelines range. *Gall v. United States*, 128 S.Ct. 586, 597 (2007). The Third Circuit agrees that failure to properly calculate the Guidelines is a procedural error that requires remand unless the error is harmless. *Gall*, 128 S.Ct. at 597; *United States v. Langford*, 516 F.3d 205, 215 (3d Cir.2008).

The parties agree that at the original sentencing, the probation officer improperly assessed Mr. Dillon one point. This incorrectly assessed second criminal history point increased Mr. Dillon's criminal history category from Criminal History Category I to Category II and correspondingly increased the then mandatory guideline range from 235 to 293 months to 262 to 327 months.

At the §3582(c)(2) resentencing, this incorrectly assessed second criminal history point increased Mr. Dillon's advisory range from 188 to 235 months to 210 to 262 months.

Here, the court did have jurisdiction to grant the §3582(c)(2) sentencing reduction. And §3582(c)(2), by its express terms, contemplates correct calculation of the

guidelines. When a sentence is modified under 18 U.S.C. § 3582(c)(2), the courts are required by the express terms of §3582(c)(2) to consider the factors set out in 18 U.S.C. § 3553(a). 18 U.S.C. §3582(c)(2). One of those factors is "the applicable sentencing range." 18 U.S.C. §§ 3553(a)(3), (4). Failure to properly calculate the Guidelines, as here, is procedural error requiring remand. *Gall v. United States*, ___ U.S. ____, 128 S.Ct. 586, 597 (2007); *United States v. Langford*, 516 F.3d 205, 215 (3d Cir.2008).

But the district court declined to reconsider whether the prior misdemeanor was properly assessed one point. App. 15-16.[10] See App. 192-93 (where Mr. Dillon suggested the court re-consider its use of that misdemeanor and requested a new presentence report). And the Third Circuit, without citing any pertinent authority, simply asserts, "the District Court had no authority to reconsider its prior criminal history determination." *Dillon*, 572 F.3d at 150. This finding conflicts with this Court's and Third Circuit precedent.

At both sentencings, the district court imposed

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[10]Mr. Dillon had previously objected to assessment of a criminal point for this misdemeanor, arguing that because he in fact had not more than one criminal history point, he should have been eligible for safety valve. Neither the district court nor the government in its response discussed whether and how imposition of the suspended sentence affected calculation of criminal history points. Docket Nos. 141-146.

sentence at the very bottom of the range because he did not believe he had authority to go any lower. The court repeatedly stated he believed the range to be unfair and to be entirely too high. App. 98-99, 158. The court went so far as to state, "he believed whatever good prison might have done for Dillon - who he said came from a good family - **could be accomplished in five years.**" App. 157.

Because this Court and the Third Circuit require that the advisory guidelines range must first be correctly calculated, the parties agree Dillon's guideline range was not correctly calculated, and the erroneous calculation mattered because the district court repeatedly bemoaned the length of the sentence and expressed regret at being without authority to impose a lesser sentence, this Court should grant the writ of certiorari, vacate the judgment, and remand for resentencing based on a correctly calculated guidelines range.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. Alternatively, this Court should grant the writ of certiorari, vacate the judgment, and remand for resentencing based on a correctly calculated guidelines range.

Respectfully submitted,

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Assistant Federal Public Defender
Counsel for Petitioner,
Percy Dillon

CERTIFICATE OF MEMBERSHIP IN BAR

I, RENEE DOMENIQUE PIETROPAOLO, Assistant Federal Public Defender, hereby certify that I am a member of the Bar of this Court.

RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion for Leave to Proceed in Forma Pauperis and Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit was mailed this 1st day of September, 2009, to the following:

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United States Court of Appeals
for the Third Circuit
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Independence Mall West
601 Market Street
Philadelphia, Pennsylvania 19106-1790

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United States Department of Justice
10th and Constitution Avenues
Washington, D.C. 20530

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Assistant United States Attorney
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Pittsburgh, Pennsylvania 15219

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Register No. 04760-068
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P.O. Box 019001
Atwater, California 95301

RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender

No.
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2008 TERM

PERCY DILLON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

DECLARATION PURSUANT TO RULE 29.2
OF THE RULES OF THE SUPREME COURT

I declare under penalty of perjury under the laws of the United States of America that the Petition for Writ of Certiorari on behalf of Percy Dillon was mailed to the Clerk's Office of the United States Supreme Court in Washington, D.C., postage and fees paid (USC-426), First Class Mail.

DATE: September 1, 2009

RENEE DOMENIQUE PIETROPAOLO
Assistant Federal Public Defender

OPPOSITION BRIEF

No. 09-6338

IN THE SUPREME COURT OF THE UNITED STATES

PERCY DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the holding of United States v. Booker, 543 U.S. 220 (2005), which remedied the constitutional defect in the Sentencing Guidelines by rendering them advisory, applies in a sentence modification proceeding under 18 U.S.C. 3582(c).

IN THE SUPREME COURT OF THE UNITED STATES

No. 09-6338

PERCY DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 572 F.3d 146.

JURISDICTION

The judgement of the court of appeals was entered on June 10, 5, 2009. The petition for a writ of certiorari was filed on September 1, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted of conspiracy to distribute and possess with the intent to distribute

more than 500 grams of cocaine and more than 50 grams of cocaine base (i.e., crack), in violation of 21 U.S.C. 846; use of a firearm during and in relation to a drug trafficking crime, in violation of 18 U.S.C. 924(c)(1); and possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to 262 months of imprisonment on the narcotics counts and 60 months, to run consecutively, on the firearms count. The court of appeals affirmed. See United States v. Dillon, 100 F.3d 949 (3d Cir. 1996) (unpub.). Petitioner filed a series of postconviction attacks on his sentence, all of which were denied. See United States v. Dillon, 229 Fed. Appx 196, 196 (3d Cir. 2007).

On December 3, 2007, petitioner filed a motion for a sentencing modification under 18 U.S.C. 3582(c). Petitioner's motion was based on a recent, retroactively applicable amendment to the federal Sentencing Guidelines, which effectively lowered the base offense level for offenses involving crack cocaine and reduced the Guidelines range on petitioner's narcotics convictions to 210 to 262 months of imprisonment. The district court granted petitioner's motion insofar as it sought a reduction of his term of imprisonment pursuant to 18 U.S.C. 3582(c)(2) and resentenced him to 210 months of imprisonment on the narcotics convictions, but the court rejected petitioner's request for a sentence below the new Guidelines range. The court of appeals affirmed. Pet. App. 1a-4a.

1. Petitioner was convicted after a jury trial of two

narcotics counts involving crack cocaine and one firearms count. Pet. App. 2a. He was sentenced to 262 months of imprisonment on the narcotics counts, the bottom of the Guidelines range, to be followed by a mandatory 60-month consecutive sentence on the firearms count, for a total sentence of 322 months of imprisonment. Ibid. At the time of sentencing, the district court stated that he "personally [didn't] believe that you should be serving 322 months, but I feel I am bound by th[e] Guidelines." Id. at 1a. In its written statement of reasons, the court wrote that, while it was bound by the guidelines range, it believed that range was "unfair to the defendant." Ibid. The court of appeals affirmed petitioner's conviction and sentence. United States v. Dillon, 100 F.3d 949 (3d Cir. 1996).

2. In United States v. Booker, 543 U.S. 220 (2005), this Court held that, because of the mandatory nature of the federal Sentencing Guidelines, the imposition of a sentence above the otherwise-applicable statutory maximum based on facts found by the judge at sentencing violates the defendant's Sixth Amendment right to trial by jury. Id. at 236-244. To remedy that constitutional defect, the Court Booker invalidated the provisions of the Sentencing Reform Act of 1984 that made the Guidelines mandatory, 18 U.S.C. 3553(b) and 3742(e), thereby "mak[ing] the Guidelines effectively advisory," Booker, 543 U.S. at 245.

3. a. On November 1, 2007, the United States Sentencing

Commission promulgated Amendment 706, which amended the Drug Quantity Table found in Section 2D1.1(c) of the Guidelines. See U.S.S.G. App. C, Amend. 706 (2007). Amendment 706 provided for a two-level reduction in the base offense levels for most offenses involving crack cocaine. Ibid. On December 11, 2007, the Sentencing Commission promulgated two additional amendments concerning Amendment 706, which, taken together, revised Section 1B1.10 to include Amendment 706 among the list of retroactively applicable amendments, effective as of March 3, 2008. See U.S.S.G. App. C, Amends. 712, 713. As so revised, Section 1B1.10 provides that,

> [i]n a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

U.S.S.G. 1B1.10(a)(1).[1] The provision also states that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." U.S.S.G. 1B1.10(a)(3).

---

[1] Section 1B1.10 is based on 18 U.S.C. 3582(c)(2), and it also implements 28 U.S.C. 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

b. In December 2007, following a series of unsuccessful postconviction challenges, petitioner filed a pro se motion pursuant to 18 U.S.C. 3582(c)(2), seeking a sentencing modification by virtue of those amendments, which lowered his Guidelines range on the narcotics counts to 210 to 267 months of imprisonment. Pet. App. A3. The district court granted petitioner's motion and resentenced him to 270 months of imprisonment -- 210 months on the narcotics counts, and 60 consecutive months on the firearms charge. The district court denied petitioner's motion, however, to the extent it argued that Booker applied and permitted the court to impose a lesser sentence. Ibid.

4. The court of appeals affirmed. Pet. App. 1a-4a. Following the position adopted by the "overwhelming majority" of other courts of appeals, Id. at 3a, the court concluded that "Booker applies to full sentencing hearings -- whether in an initial sentencing or in a resentencing where the original sentence is vacated for error, but not to sentence modification proceedings under Section 3582(c)(2)." Id. at 4a.

ARGUMENT

Petitioner contends (Pet. 5-22) that this Court should grant certiorari to resolve the circuit conflict on the question whether Booker's remedial holding extends to a sentence modification proceeding conducted under Section 3582(c)(2). For the reasons set forth in the government's brief in opposition in United States v.

Rhodes, No. 08-8318, a copy of which has been served on counsel for petitioner, the decision below is correct and further review is unwarranted at this time. This Court has recently denied a number of petitions for certiorari raising this conflict. See United States v. Fanfan, 2009 WL 1421273 (Oct. 5, 2009) (No. 08-10503); United States v. Cunningham, 129 S. Ct. 2826 (2009) (No. 08-1149); United States v. Melvin, 129 S. Ct. 2382 (2009) (No. 08-8664); United States v. Starks, 129 S. Ct. 2746 (2009) (No. 08-9839); United States v. Dunphy, 129 S. Ct. 2401 (2009) (No. 08-1185); Rhodes, supra, 129 S. Ct. 2052 (2009) (No 08-8318). There is no reason for a different result here.

As the government noted in Rhodes, all of the courts of appeals that have considered the issue, with the exception of the Ninth Circuit in United States v. Hicks, 472 F.3d 1167 (9th Cir. 2007), have concluded that Booker does not apply in Section 3582(c) sentence modification proceedings. See U.S. Br. at 15-16, Rhodes, supra (No. 08-8318); see also United States v. Washington, 2009 WL 3425689, at *4 (6th Cir. Oct. 27, 2009) (joining majority view and collecting cases). The Ninth Circuit recently granted the government's petition for an initial hearing en banc in United States v. Fox, No. 08-30445 (9th Cir.), in which the government is urging the Ninth Circuit to overrule Hicks. If the Ninth Circuit overrules Hicks, the current circuit conflict will disappear. And if the court of appeals adheres to Hicks, the government would

retain the option of seeking this Court's review at that time. The pendency of the proceedings in Fox therefore renders this Court's review of this issue premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

LANNY A. BREUER
Assistant Attorney General

MICHAEL A. ROTKER
Attorney

OCTOBER 2009

JOINT APPENDIX

Supreme Court, U.S.
FILED
JAN 25 2010
OFFICE OF THE CLERK

No. 09-6338

In The Supreme Court of the United States

PERCY DILLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

JOINT APPENDIX

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Petition For Writ Of Certiorari Filed September 1, 2009
Certiorari Granted December 7, 2009

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5/19/2009	Submitted on Tuesday, May 19, 2009
6/10/2009	Not Precedential Opinion filed
06/10/2009	Judgment, Affirmed
06/10/2009	Precedential Opinion. Per Court's Order dated 7/23/09 the 6/10/09 opinion is now designated as Precedential as of 6/10/09
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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA.

UNITED STATES
OF AMERICA

Plaintiff

vs. Criminal No. 93-84

PERCY DILLON

Defendants

PROCEEDINGS

Transcript of Trial commencing on November 19, 1993, United States District Court, Pittsburgh, Pennsylvania, before Honorable Alan Bloch, District Judge.

APPEARANCES:

For the Government: By: Joseph Yablonski, Esq.

For the Defendant:
(Dillon) Jerome DeRiso, Esq.

Reported by:
William E. Weber, RPR, CM
Official Court Reporter
1027A, U.S. Courthouse
Pittsburgh, Pa. 15219
(412) 261-2446

Proceedings recorded by mechanical stenography. Transcript produced by computer-aided transcription.

[2] THE COURT: This is the date and time we set for the sentencing hearing in the matter of the United States versus Percy Dillon, Criminal Number 93-84. The record should indicate the Court has received letters concerning the defendant which we will mark as Court Exhibits and make part of the record. Those would include letters from Percy Dillon, II dated October 28th, 1993, Yvonne Dillon dated October 15th, 1993, Tracey Ramirez dated November 8, 1993, Chris Earle undated, Veronica J. Appleberry dated November 9, 1993 and Loretta M. Whittle dated November 16, 1993.

This sentencing hearing is governed by the provisions of the Sentencing Reform Act of 1984, Federal Rule of Criminal Procedure 32 as amended effective November 1, 1987 and Local Rule 41. We would ask counsel and defendant come forward. The Clerk will place the defendant under oath.

PERCY DILLON, having been first duly sworn, testified as follows:

THE COURT: Mr. Dillon, have you read the presentence report?

MR. DILLON: Yes.

THE COURT: You will have to keep your voice up.

MR. DILLON: Yes.

THE COURT: Has your attorney reviewed it with you?

MR. DILLON: Yes.

[3] THE COURT: On November 15th, 1993, the Court issued its tentative findings and rulings concerning disputed facts or factors in this case. The parties have since had an opportunity to file further objections to the Court's tentative findings and rulings and the Court has not received any further written objections.

The Court at this time will give the parties the opportunity to present evidence concerning the matters covered in the tentative findings. Mr. DeRiso?

MR. DERISO: Your Honor, if I may make a statement to the Court. Upon receiving your tentative findings, Your Honor, and Mr. Dillon takes no issue with the findings as such. He has submitted to the Court a letter.

THE COURT: Yes. I have the letter here which I intend to, it is a letter dated November 8th, 1993 and I intend to mark it as a Court Exhibit and make it part of the record of this hearing. I consider this an acceptance of responsibility by the defendant.

MR. DERISO: Thank you, Your Honor.

THE COURT: If the Clerk will take this letter and mark it and make it part of the record. Have you seen that?

MR. YABLONSKI: No, I have not, first time I have heard of it, Your Honor.

THE COURT: Show it to Mr. Yablonski. Go ahead.

MR. DERISO: Your Honor, we are well aware of the [4] Court's requirement to follow the law. We still for the record request that the Court continue to consider downward departure from the Guidelines for the following reasons: The statutory mandatory calls for a minimum mandatory of ten years based on the amount of crack cocaine. That is something that we are well aware of that the Court based on its obligation, its oath must follow.

The question then is whether or not the Court can downwardly depart from the Guidelines if in the Court's opinion it would believe that the applications of the Guidelines cause a disparity, something that Congress did not intend and possibly something the Commission did not intend.

The evidence that we presented to the Court, which I am sure the Court reviewed, indicates without any question that the application of the Guidelines when we involve the crack cocaine because of the 100-to-1 ratio, not because the Commission intended to prosecute or persecute African-Americans, just the application of it because although there is no difference in the physical characteristic of cocaine and powder cocaine and crack cocaine, just because of the environmental problems we have in our society today, African-Americans and the communities in which they reside

are the ones that frequently use it more than Caucasian.

[5] The court in Nebraska, the Court is aware the District Court of Nebraska found that there was a disparity and refused to apply the Guidelines. The matter I wanted to bring before the Court is that the appellate court, the Court of Appeals in the District of Columbia has determined or has found that although the Court can't go against the statute by Congress, the same honor required, same obedience isn't required of the Commission, the Sentencing Commission of the Guidelines.

This is in the case United States versus Price where it said it is more true the courts would normally sustain an act of Congress as long as within the bounds of congressional authority. Whatever the exact deference owed Congress on Constitutional matters, the Sentencing Commission cannot be said to occupy a parallel position.

I am aware of the Guidelines. Mr. Dillon is, Your Honor. Again, the disparity with the 100-to-1 ratio in crack cocaine we find – I know what the Commission says – it is immoral. Nothing I can do about it. We are asking you to do whatever you can do. I don't know. We thank you, Your Honor, for your attention here. I have nothing further.

THE COURT: Mr. Yablonski?

MR. YABLONSKI: I had no objections to the presentence report, Your Honor, as it was written.

My [6] position, for the record, is that the factual matters set forth in the presentence report were matters which were established at trial. I don't have any additional evidence to offer at this time.

I would just rely on what was proved at trial as supporting the Government's position. I think the Court has adequately dealt with the request for a downward departure and rejected it for appropriate reasons. Other than that, I have nothing further.

THE COURT: The Court having found that the defendant has clearly demonstrated acceptance of responsibility by the letter he submitted to the Court, therefore the defendant's offense level shall be decreased by two levels pursuant to United States Sentencing Guidelines Section 3E1.1.

The Court having reviewed the original objections filed by the parties and having heard the evidence and arguments presented at this hearing adopts the tentative findings and rulings of the Court as just amended, the amendment would be the decrease of two points for acceptance of responsibility as its final findings and rulings.

I have heard Mr. DeRiso's comments about what the sentence ought to be. Do you have anything further to say about that Mr. Yablonski?

MR. YABLONSKI: No, I don't, I believe Your Honor [7] is well aware of the nature and scope of this offense.

THE COURT: As I understand it, there is no victim so restitution isn't a matter we need to deal with?

MR. YABLONSKI: That's correct.

THE COURT: Is there anything you wish to say to me Mr. Dillon before I sentence you?

MR. DILLON: I'd just like to say I'm sorry for the hardship I brought on my mom, my father, society and I ask you just be lenient in your sentencing of me.

MR. DERISO: Your Honor, if I May, one more thing, Mr. Dillon's family resides in California and if it would be suitable if the Court would recommend on –

THE COURT: I will recommend he be incarcerated as near his home as possible.

MR. DERISO: Thank you, Your Honor.

THE COURT: Pursuant to the Sentencing Reform Act of 1984 it is the judgment of the Court that the defendant, Percy Dillon, is hereby committed to the custody of the Bureau of Prisons to be imprisoned form a term of 322 months. This term consists of a term of 262 months as to Counts 1 and 4 and a term of 60 months as to Count 2 to be served consecutively with the term imposed at Counts 1 and 2.

Upon release from imprisonment the defendant shall be placed on supervised release for a term of

five years. [8] Within 72 hours of release from the custody of the Bureau of Prisons the defendant shall report in person to the Probation Office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state or local crime and shall comply with the standard conditions that have been adopted by this Court.

The Court will recommend that the defendant be imprisoned as close to his home in San Francisco, California as possible.

The Court finds based upon the presentence report and the party's statement that the defendant is not able and even with the use of a reasonable installment schedule is not likely to become able to pay all or any part of the fine required by the Guidelines, therefore, the Court will waive imposition of a fine.

It is further ordered that as to each of Counts 1, 2 and 4 the defendant shall pay the United States a special assessment of $50 as to each count or a total of $150 which would be due immediately.

Mr. Dillon, the United States Sentencing Guidelines allow me to sentence you to a term imprisonment ranging from 322 to 387 months. I chosen to sentence you to the minimum possible under the range provided by the Guidelines. The [9] crimes you were convicted of are very serious crimes, however, I personally don't believe that you should be

serving 322 months. But I feel I am bound by those Guidelines and I don't feel there is any grounds for, which can depart from those Guidelines.

I hope that while you are in prison, which will be a very long, considerable period of time, that you will take some time to consider the direction that your life will take when you do return to society. I don't know if there is any way, but I would hope that if you have friends and family in your community at home, you will convey to them the seriousness of the penalties for dealing in drugs. It is only through people like you if you spread the word that other young men of your age will hesitate to get involved in it.

I don't say to you that these penalties are fair. I don't think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime. But I would hope that young people like you in your community back home will get to know that this is what is going to happen to them. Maybe that will deter at least some of them.

Mr. Dillon, I hereby advise you that you have a right to appeal within ten days and if you are unable to pay the cost of an appeal, you may apply for a leave to appeal in [10] forma pauperis. If you are given leave to appeal in forma pauperis, you may request the Clerk of Court to prepare and file forthwith a notice of appeal on your behalf.

The other letters I mentioned having been received by the Court will also be marked as Court Exhibits and made part of the record. There being

nothing further to come before the Court at this time, we will adjourn.

(Court adjourned

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Wm. E. Weber
William E. Weber, RPR, CM
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

V.

PERCY DILLON

JUDGMENT INCLUDING SENTENCE UNDER THE SENTENCING REFORM ACT

Case Number CR 93-84

/s/ Jerome DeRiso, Esq.
Defendant's Attorney

THE DEFENDANT:

____ pleaded guilty to count(s)

xx was found guilty on count(s) one, two and four after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
21 USC 846	Conspiracy to distribute & possess with intent to distribute in excess of 500 grams of cocaine & in excess of 50 grams of cocaine base	3-20-93	One
18 USC 924(c)(1)	Use of firearm during & in relation to drug trafficking	1-30-93	Two
18 USC 841(a)(1)	Possession with intent to distribute in excess of 500 grams of cocaine	3-20-93	Four

The defendant is sentenced as provided in pages 2 through 5 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

____ The defendant has been found not guilty on count(s) ___ and is discharged as to such count(s).

____ Count(s) (is) (are) dismissed on the motion of the United States.

____ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

xx It is ordered that the defendant shall pay to the United States a special assessment of $150.00, which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for the district within 30 days of any change of residence or mailing address until all fines, restitution, costs and special assessments imposed by this Judgment are fully paid.

Defendant's
Soc. Sec. Number:
[Social Security
Number Omitted]

Defendant's
Date of Birth:
[Date Of Birth Omitted]

Defendant's
mailing address:
[Home Address Omitted]

Defendant's
residence address
same as above

November 19, 1993
Date of Imposition of
Sentence

/s/ Alan N. Bloch
Signature of Judicial Officer
Alan N. Bloch, United
States District Judge

11/22/93
Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of three-hundred and twenty-two (322) months. This term consists of a term of two hundred and sixty-two (262) months as to Counts 1 and 4 and a term of sixty (60) months as to Count 2, to be served consecutively with the term imposed at Counts 1 and 4.

xx The Court makes the following recommendations to the Bureau of Prisons:

that the defendant be imprisoned as close to his home in San Francisco, CA as possible.

xx The defendant is remanded to the custody of the United States Marshal.

___ The defendant shall surrender to the United States Marshal for this district,

___ at ___ a.m./p.m. on _____.

___ as notified by the Marshal.

___ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

___ before 2 p.m. on _____.

___ as notified by the United States Marshal.

___ as notified by the Probation Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of five (5) years.

While on supervised release, the defendant shall not commit another Federal, state or local crime and shall not illegally possess a controlled substance. The defendant shall comply with the standard conditions that have been adopted by this court (set forth on the following page). If this judgment imposes a restitution obligation, it shall be a condition of supervised release that the defendant pay any such restitution that remains unpaid at the commencement of the term of supervised release. The defendant shall comply with the following additional conditions:

xx The defendant shall report in person to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

___ The defendant shall pay any fines that remain unpaid at the commencement of the term of supervised release.

___ The defendant shall not possess a firearm or destructive device.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on probation or supervised release pursuant to this Judgment:

1) The defendant shall not commit another Federal, state, or local crime;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer;

3) the defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall support his or her dependents and meet other family responsibilities;

6) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

7) the defendant shall notify the probation officer within seventy-two hours of any change in residence or employment;

8) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

9) the defendant shall not frequent places where controlled substances are illegally sold used, distributed, or administered;

10) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

12) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

13) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

14) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history of characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

These conditions are in addition to any other conditions imposed by this Judgment.

STATEMENT OF REASONS

___ The court adopts the factual findings and guideline application in the presentence report.

OR

xx The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

as amended by the Tentative Findings Concerning Disputed Facts or Factors and this Court's amended findings pursuant to USSG §3E1.1

Guideline Range Determined by the Court:

Total Offense Level: 38

Criminal History Category: II

Imprisonment Range: 322 to 387 months

Supervised Release Range 5 years

Fine Range: $25,000.00 to $4,000,000.00

xx Fine is waived or is below the guideline range because of the defendant's inability to pay.

Restitution: $

___ Full restitution is not ordered for the following reason(s):

___ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

xx The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

While the Court considers the defendant's offenses serious, it also believes that the guidelines range is unfair to the defendant. The Court, however, is bound by the guidelines range. Therefore, this Court sentenced the defendant to the minimum of the guidelines range.

OR

The sentence departs from the guideline range

___ upon motion of the government, as a result of defendant's substantial assistance.

___ for the following reason(s)

THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA

UNITED STATES OF AMERICA	)	
vs.	)	Criminal No. 93-84
PERCY DILLON,	)	
Defendant.	)	

ORDER

AND NOW, this 16th day of November, 1999, upon consideration of Defendant's *Pro Se* Motion to Review Sentence Under 18 U.S.C. § 3742(a)(2) (document No. 141) filed in the above captioned matter on July 13, 1999, and the Supplements thereto (document Nos.144 and 145) filed in the above captioned matter on September 24 and November 1, 1999, and upon further consideration of the Government's Response thereto,

IT IS HEREBY ORDERED that said Motion and Supplements are DENIED.

I. Background

On September 17, 1993, defendant Percy Dillon was convicted of the following offenses: (1) conspiracy to distribute and possess with intent to distribute in excess of 500 grams of cocaine and in excess of 50 grams of cocaine base in violation of 21 §846; (2) use of a firearm during and in relation to a drug

trafficking crime in violation of 18 U.S.C. §924(c)(1); and (3) possession with the intent to distribute in excess of 500 grams of cocaine, in violation of 18 U.S.C. §841(a)(1). On November 19, 1993, the Court sentenced Dillon to a term of 322 months imprisonment. The Third Circuit Court of Appeals ultimately upheld this sentence after defendant's direct appeal.

On September 8, 1997, defendant filed a motion under 28 U.S.C. § 2255 to vacate his sentence. On October 20, 1997, the Court denied defendant's Section 2255 motion. Defendant's subsequent appeals to the Third Circuit and United States Supreme Court were unsuccessful.

II. Discussion

In the motion presently before the Court, defendant challenges the Court's failure to apply the "safety valve" provisions of Section 5C1.2 of the United States Sentencing Guidelines (U.S.S.G.) in determining his sentence.[1] Defendant requests review

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[1] Section 5C1.2 provides that, with regard to certain specified offenses, a court may sentence a defendant without regard to any statutory minimum sentence if:

(1) The defendant does not have more than 1 criminal history point, as determined under the sentencing guidelines;

(2) The defendant did not use violence or credible threats of violence or possess a firearm or other dangerous weapon (or induce another participant to do so) in connection with the offense;

(Continued on following page)

of his sentence under Federal Rule of Criminal Procedure 35 and 18 U.S.C. Section 3742(a)(2). Neither of these provisions, however, provide the Court with jurisdiction to conduct such a review.[2]

Because the defendant is proceeding pro se, the Court will consider whether defendant's motion could be properly brought under any other statute. *See Royce v. Hahn,* 151 F.3d 116, 118 (3d Cir. 1998) (holding that pro se petition should not be dismissed until "other legitimate avenues of relief are considered"). An inmate's challenge to the calculation

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(3) The offense did not result in death or serious bodily injury to any person;

(4) The defendant was not an organizer, leader, manager, or supervisor of others in the offense, as determined under the sentencing guidelines and was not engaged in a continuing criminal enterprise, as defined in 21 U.S.C. § 848; and

(5) Not later than the time of the sentencing hearing, the defendant has truthfully provided to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan, but the fact that the defendant has no relevant or useful other information to provide or that the Government is already aware of the information shall not preclude a determination by the court that the defendant has complied with this requirement.

[2] Rule 35 permits district courts to correct sentences on remand from a court of appeals or to correct technical errors in the calculation of the sentence within *seven days* after the sentence was imposed. Fed. R. Crim. P. 35(a) & (c). Section 3742 governs appeals to the court of appeals, not the district court. Neither provision permits the Court to consider defendant's present motion.

of his sentence by the sentencing court would normally be brought under 18 U.S.C. Section 2255. However, even construing the motion as having been brought under this statute, the Court remains without jurisdiction.

As outlined above, petitioner has already sought relief under Section 2255. This statute explicitly prohibits a district court from entertaining a second or successive Section 2255 motion in the absence of a certificate from a panel of the appropriate court of appeals certifying that the petitioner has raised either "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255. Petitioner has not obtained such a certificate from the Third Circuit.[3] Accordingly, this Court would still be without jurisdiction to consider this motion even if it were construed as a petition under Section 2255.

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[3] It is also unlikely that defendant would obtain such a certificate even if he were to apply for one, given the fact that defendant does not appear to qualify under the "safety valve" provisions of U.S.S.G. Section 5C1.2 outlined above. Defendant has more than one criminal history point, as discussed below, and the government has represented to the Court that the defendant has failed to provide it with any information concerning the offense.

In his second "supplement" to the present motion (document No. 145), defendant argues that, because a conviction used to calculate his criminal history was recently withdrawn, his sentence should be recalculated. Defendant apparently relies on Rule 60(b) of the Federal Rules of *Civil,* Procedure, which permits relief from a judgment or order based on newly discovered evidence, to raise this issue before the Court. Though the Court finds no basis for jurisdiction in Rule 60(b), defendant could potentially bring this claim under the federal habeas corpus statute, 28 U.S.C. Section 2241.[4]

Even considering the merits of defendant's argument, the Court remains unpersuaded that defendant's criminal history, which assessed him with two criminal history points, should be recalculated. The conviction challenged by defendant arose after defendant was arrested in California by police officers who observed him carrying what appeared to be a bag of cocaine. On May 23, 1990, defendant pled guilty in San Francisco Municipal Court to a misdemeanor count of resisting arrest. Defendant was placed on two years probation and successfully completed a six month diversion program.

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[4] Because this "supplement" to petitioner's motion concerns the effect of events subsequent to his sentence upon that sentence, Section 2241 and not Section 2255 provides the appropriate framework of analysis *See Gomori v. Arnold,* 533 F.2d 871, 874 (3d Cir. 1976). Thus, defendant avoids the successive petition problem described above, but only with respect to the effect of the recently withdrawn prior conviction.

On October 1, 1999, the Superior Court of California issued an order stating that, because defendant had satisfied the conditions of his probation, he would be allowed to withdraw his guilty plea and the charge against him would be dismissed. The order also released defendant "from all penalties and disabilities resulting from the conviction pursuant to Penal Code Section 1203.4."

Unfortunately for defendant, the setting aside of a conviction under California Penal Code Section 1203.4 has no effect on the calculation of his sentence under the federal sentencing guidelines. *See United States v. Padilla-Duran,* No. 96-56109, 1997 WL 210776 (9th Cir. Apr. 21, 1997). In the first place, California Penal Code, Section 1203.4, provides that "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed." Furthermore, the sentencing guidelines themselves specifically mandate that convictions set aside under state law be counted in computing criminal history. U.S.S.G. § 4A1.2, note 10; *see also United States v. Amster,* No. 98-7625, 1999 WL 796823 (3d Cir. Oct. 7, 1999) (counting two "diversionary dispositions" in criminal history calculation under U.S.S.G. Section 4A1.2(f) even where nolo contendere pleas were vacated and cases dismissed). The Court, therefore, denies defendant's motion.

Finally, a certificate of appealability should not issue in this case. A certificate of appealability may

issue in federal habeas corpus proceedings or under 28 U.S.C. § 2255 "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Because defendant has not made such a showing, the Court will not issue a certificate of appealability.

/s/ Alan N. Bloch
United States District
Judge

cc: Asst. U.S. Atty. Michael Ivory
633 U.S. Post Office & Courthouse,
Pittsburgh, PA 15219

Percy Dillon, #04760-068
Box PMB, Atlanta, GA 30315

United States District Court for the
Western District of Pennsylvania
United States v. Percy Dillon

(Filed Jan. 7, 2008)

To: Senior Judge, Alan Bloch
P.O. Box 1805
Pitt., Pa. Jan. 3, 2008

Re: Case No. 93-84. Motion for Sentence Reduction, filed Dec. 05, 2007

Dear Judge Bloch,

Hello Sir, I *need* the Court to *Delete* from my Pro Se motion, at page 5 quoting "Petitioner request a form to 'sign' under Federal Rules of Civil Procedure Rule 43(b)(4), that 'specifies the courts corrections or reductions of sentence stating months."

Please *Delete* this cite and request because I would like to file a sentencing memorandum on my behalf if necessary and do not want to waive any rights thereto.

I cited 43(b)(4) to make the courts process of sentence reduction ten times easier. However, the Supreme Courts recent ruling in U.S. vs. Kimbrough, and 18 USC 3553(a)(b), has forced petitioner to

reassess that rule and allow himself to continue litigation via sentencing memorandum if necessary.

Respectfully Requested

s/ Percy Dillon

Percy Dillon, Pro Se
P.O. Box 019001
Atwater, Ca. 95301

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	
VS.	)	Criminal No. 93-84
PERCY DILLON,	)	
Defendant.	)	

ORDER

AND NOW, this 11th day of June, 2008, upon consideration of Defendant Percy Dillon's *pro se* Motion to modify his sentence under 18 U.S.C. § 3582(c)(2) based on a recent reduction under "Amendment #9" to the Sentencing Guidelines (Document No. 206) filed in the above-captioned matter on December 3, 2007, and supplemented on January 10 and March 3, 2008, and upon further consideration of the Government's Response thereto (document No. 212) and Defendant's Reply to the Government's Response (Document No. 217),

IT IS HEREBY ORDERED that said Motion is GRANTED in part and DENIED in part. Specifically, it is granted to the extent that it seeks a reduction in sentence pursuant to 18 U.S.C. § 3582(c)(2) but denied to the extent that it seeks a reduction in excess of that which the Court has jurisdiction to grant.

Defendant's motion seeks a reduction in his sentence pursuant to 18 U.S.C. § 3582(c)(2) based on

Amendments 706 and 711 to the United States Sentencing Guidelines, which amended the Guidelines' determination of base offense levels for crack cocaine offenses. He further argues that, in determining the extent of the reduction, the Court must apply the holding of *United States v. Booker,* 543 U.S. 220 (2005), and treat the new guideline sentencing range provided for pursuant to Amendments 706 and 711 as merely advisory.[1] Moreover, he argues that the Court should reconsider its use of one of his prior convictions and reduce his sentence pursuant to USSG § 4A1.3(b)(1).

Section 3582(c) provides that a sentencing court "may not modify a term of imprisonment once it has been imposed" except under the circumstances set forth in subsections (1) and (2). It is subsection (2) that is at issue here. That subsection provides:

> [I]n case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment after considering the factors set forth in

---

[1] The Court notes that since the filing of Defendant's motion, the Sentencing Commission has enacted Amendment 715 and made it retroactive. This amendment also impacts Defendant's new guideline sentencing range.

> section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

Section 1B1.10 of the United States Sentencing Guidelines contains the policy statements applicable for sentence reductions as a result of an amended guideline range. Subsection (c) provides that Amendments 706, 711, and 715, which pertain to the changes made in calculating base offense levels for offenses involving cocaine base, are covered by this section.

Specifically, Amendment 706 amended USSG 2D1.1(c), which sets forth the base offense level applicable under Section 2D1.1 based on the amount of cocaine base attributable to the defendant. The amendment lowered the offense level relative to the quantity of cocaine base involved and also addressed situations where some other type of controlled substance in addition to cocaine base is also attributable to the defendant. Amendment 711 amended Amendment 706. Amendment 715 essentially amended both in regard to the calculation of the base offense level when another type of controlled substance is also involved.

Here, Defendant's base offense level under the pre-amendment version of 2D1.1(c) was 38. This was based on the total amount of 1.5 kilograms of cocaine base and 1.6 kilograms of powder cocaine attributable to him. Pursuant to Application Note 10 to Section

2D1.1, these quantities were converted to their marijuana equivalent, 30,320 kilograms, which provided for the base offense level. Factoring in the other adjustments to his offense level, which have not been affected by the amendments at issue, and his criminal history category of II, Defendant's guideline sentencing range for Counts One and Four was 262-327 months, to be followed by a mandatory 60-month consecutive sentence at Count Two. On November 19, 1993, this Court sentenced Defendant to the low end of this range, resulting in a total sentence of 322 months.

Under Section 2D1.1, as amended by Amendments 706 and 711, the quantity of controlled substances attributable to Defendant, after conversion to the marijuana equivalent, would have been 10,370 kilograms, which would have yielded a base offense level of 36. Under Section 2D1.1, as further amended by Amendment 715, the drug quantity attributable to Defendant, after conversion to the marijuana equivalent, would be the same as in his initial sentencing, 30,320 kilograms, and would still provide for a base offense level of 38. However, pursuant to Application Note 10(D)(i), Defendant would be entitled to a two-level reduction in that offense level, meaning that his adjusted base offense level would be 36. Accordingly, regardless of whether the Court applies Amendment 715 or not, Defendant's new base offense level is 36, and this change lowers Defendant's guideline sentencing range at Counts One

and Four from 262-327 months to 210-262 months.[2] The mandatory 60-month consecutive sentence at Count Two is unaffected.

The Court finds, after considering the Section 3553(a) factors, that a reduction in Defendant's sentence pursuant to Section 3582(c)(2) is warranted in this case. The Court further finds that a sentence at the low end of the still-substantial guideline sentencing range is appropriate, given the scope of Defendant's conduct and his history and characteristics, particularly his relatively minor criminal history. Accordingly, the Court will, by separate order, amend Defendant's sentence to a sentence of 270 months, consisting of 210 months at each of Counts One and Four, to be served concurrently, and 60 months at Count Two, to be served consecutive to the terms imposed at Counts One and Four.

This would seemingly end the analysis. However, Defendant argues that even further reduction of his sentence is warranted, pursuant to *United States v. Booker*, 543 U.S. 220 (2005). Specifically, he argues that since *Booker* rendered the Sentencing Guidelines

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[2] Defendant's argument that his new base offense level is 34 appears to confuse the standard for determining the marijuana equivalent under Amendments 706, as amended by 711, and 715. Defendant seeks the best of both worlds – the lower conversion rate under Amendments 706 and 711 and the two-level reduction under Amendment 715. Unfortunately for him, the Court must apply either one or the other, not a hybrid of the two.

merely advisory, the Court must treat the guideline range as merely advisory in a Section 3582 re-sentencing such as this one. The Court disagrees.

When Section 1B1.10 was amended to include Amendments 706 and 711 as retroactive amendments, other substantive changes were made to this section. Section 1B1.10(b)(2)(A) now provides:

> Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

The exceptions provided for in Subsection (2)(B) do not apply here, since Defendant's original term of imprisonment was not less than the term provided by the guideline range applicable at the time of his sentencing.

Defendant's position appears to be that, regardless of this language, since, pursuant to *Booker*, Section 1B1.10 is no more binding than any other portion of the Guidelines, the Court is not bound by these restrictions and may sentence him outside of the newly found guideline range. However, this argument mischaracterizes the nature of a reduction of sentence under Section 3582(c)(2). A reduction pursuant to Section 3582(c) does not constitute a *de nova* re-sentencing. *See United States v. McBride*, 283 F.3d 612, 615 (3d Cir. 2002); USSG § 1B1.10,

Background. Indeed, in *McBride,* the Third Circuit held that *Apprendi v. New Jersey,* 530 U.S. 466 (2000), was not applicable in reducing a sentence under Section 3582(c)(2). The Court refused to apply *Apprendi* even though that case was decided subsequent to the defendant's original sentencing but prior to his Section 3582(c)(2) reduction. Instead, the court held that "the retroactive amendment merely replaces the provision it amended and, thereafter, the Guidelines in effect at the time of the original sentence are applied." 283 F.3d at 615.

Apprendi, like *Booker,* placed constitutional limits on the sentence which can be imposed on a criminal defendant. Accordingly, if *Apprendi* does not apply in a 3582(c)(2) proceeding, it would seem that *Booker* would likewise be inapplicable in such a limited proceeding. Indeed, almost all courts to have addressed the issue have held that *Booker* does not apply in such proceedings. *See, e.g., United States v. Moreno,* 421 F.3d 1217, 1220-21 (11th Cir. 2005); *United States v. Hudson,* 242 Fed. Appx. 16 (4th Cir. 2007); *United States v. Roberson,* 2008 WL 2020209, at *2 (M.D. Pa. May 8, 2008); *United States v. Julien,* 2008 WL 1933340 (D. Me. May 2, 2008); *United States v. Eugene,* 2008 WL 1803628 (W.D. Va. Apr. 21, 2008); *Montes v. United States,* 2008 WL 906079, at *2 (S.D.N.Y. Apr. 3, 2008); *United States v. Means,* 2008 WL 718158, at *2 (M.D. Fla. Mar. 14, 2008); *United States v. Cruz,* 2008 WL 539216 (E.D.N.Y. Feb. 27, 2008); *United States v. Hopkins,* 2008 WL 504002, at *1 (N.D. Iowa Feb. 21, 2008). *Cf. United*

States v. Swint, 2007 WL 2745767, at *3 n.1 (3d Cir. Sept. 21, 2007).

The rationale for this is that 3582(c) does not simply provide a vehicle for re-opening sentences for further consideration, but rather, sets forth the exceptions to the prohibition on modifying criminal sentences. As such, the statute limits the court's jurisdiction to modify sentences except as set forth in the statute. *See United States v. Higgs,* 504 F.3d 456, 464 (3d Cir. 2007); *United States v. Smith,* 438 F.3d 796, 799 (7th Cir. 2006); *Cruz,* 2008 WL 539216, at *4. The language of 3582(c)(2) makes it clear that modifications of a sentence based on a subsequently amended guideline sentencing range are limited to reductions "consistent with applicable policy statements by the Sentencing Commission."[3] Therefore, for this Court to even have jurisdiction to reduce Defendant's sentence, the sentence must be consistent with the policy statements set forth in Section 1B1.10 of the Guidelines.

In other words, even if the Sixth Amendment concerns addressed in *Booker* applied in a limited proceeding such as one under 3582(c)(2), and even if the language of 1B1.10 was thereby rendered advisory, the Court still could not sentence Defendant to

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[3] Indeed, the Court notes that the fact that a sentence can only be reduced under Section 3582(c)(2), and not increased, demonstrates the limited nature of the Court's ability to modify Defendant's sentence in this case.

a term lower than the bottom of the amended guideline range. Such a sentence would be patently inconsistent with the policy statement set forth in Section 1B1.10, and, therefore, Section 3582(c)(2) would not permit such a sentence. It is important to remember that, unlike Section 3553, which applies to all criminal sentences, Section 3582(c)(2) is a narrow exception to a general rule forbidding the modification of an already imposed sentence.

It should be noted that at least one court, the Ninth Circuit Court of Appeals, has come to a different conclusion and held that *Booker* does apply in Section 3582(c)(2) reduction proceedings. *See United States v. Hicks,* 472 F.3d 1167 (9th Cir. 2007). However, in *Hicks,* the Ninth Circuit considered the prior language of Section 1B1.10, which did not include the limitations regarding sentencing a defendant no lower than the bottom of the new guideline range as set forth in subsection (b)(2). That court's conclusion that the Sentencing Commission's policy statements were not inconsistent with the application of *Booker* is no longer valid. Indeed, the amendments to Section 1B1.10 appear to have been enacted specifically to prevent the application of *Booker* to Section 3582(c)(2) proceedings.

The Ninth Circuit does go on, in dicta, to hold that "under *Booker,* to the extent that the policy statements would have the effect of making the Guidelines mandatory (even in the restricted context of § 3582(c)(2)), they must be void." *Id.* at 1172. However, the court does not explain this dicta. In any

event, this Court is not persuaded, since, as discussed above, Section 3582(c)(2) is very much unlike the provisions at issue in *Booker*. As discussed, Section 3582(c)(2) is jurisdictional and represents a narrow exception to a general provision preventing ***any*** sentence modifications. While the Sixth Amendment certainly guarantees certain rights in regard to sentencing, it does not create any right to later modification of a presumptively valid sentence. Congress can limit the modification of otherwise lawful sentences as it sees fit.

Moreover, there is no indication that simply rendering void all provisions of Section 1B1.10 that mandate a guideline sentence would in any way further the legislative intent of either Section 3582(c)(2) or Section 1B1.10. To the contrary, Section 3582(c)(2) purports to create a limited opportunity for a court to reduce a valid sentence and has been construed as such. Section 1B1.10 was specifically amended to make it clear that *Booker* variances are not consistent with Sentencing Commission policy statements. Accordingly, this Court rejects the view of the Ninth Circuit and agrees with those courts that have held that *Booker* does not apply in Section 3582(c)(2) proceedings.

The Court likewise rejects Defendant's argument that the Court should disregard any of his prior convictions which formed the basis for his criminal history category in his original sentencing or that it should consider a departure under Section 4A1.3(b)(1) of the Guidelines. As the Court has noted, only those

guideline determinations impacted by Amendments 706, 711, and 715 may be amended pursuant to Section 3582(c)(2). As the Third Circuit held in *McBride*:

> It is, thus, clear that only the retroactive amendment is to be considered at a re-sentencing under § 3582 and the applicability of that retroactive amendment must be determined in light of the circumstances existent at the time sentence was originally imposed.

283 F.3d at 615. *See also* USSG § 1B1.10, App. Note 2. Accordingly, Neither Section 1B1.10 nor Section 3582(c)(2) permit this Court to re-examine any of the prior convictions which formed the basis of the Court's original guideline determinations. The Court, thus, has no need for a new presentence investigation report, as Defendant suggests.

Since the information needed for the Court to consider the 3553(a) factors is already part of the record of this case, and since the Court has decided that it will sentence Defendant to the low end of the amended guideline sentencing range, no hearing is needed. As noted above, the Court will issue an order modifying Defendant's sentence as set forth herein.

/s/ Alan Bloch
United States District Judge

cc: Asst. U.S. Atty. Michael Ivory

Asst. Federal Public Defender Elisa Long

Percy Dillon, #04760-068
USP Atwater
U.S. Penitentiary
P.O. Box 019001
Atwater, CA 95301

UNITED STATES DISTRICT COURT
for the
Western District of Pennsylvania

United States of America v. Percy Dillon Date of Previous Judgment: 11-19-1993 (Use Date of Last Amended Judgment if Applicable)	Case Number 2:93-cr-00084-002 USM No. 04760-068 Asst. Federal Public Defender Elisa Long Defendant's Attorney

Order Regarding Motion for Sentence Reduction Pursuant to 18 U.S.C. § 3582(c)(2)

Upon motion of X the defendant ❒ the director of the Bureau of Prisons ❒ the court under 18 U.S.C. § 3582(c)(2) for a reduction in the term of imprisonment imposed based on a guideline sentencing range that has subsequently been lowered and made retroactive by the United States Sentencing Commission pursuant to 28 U.S.C. § 994(u), and having considered such motion,

IT IS ORDERED that the motion is:

❒ DENIED X GRANTED and the defendant's previously imposed sentence of imprisonment (as reflected in the last judgment issued) of 322 months **is reduced to** 270 months.

I. COURT DETERMINATION OF GUIDELINE RANGE (Prior to Any Departures)

Previous Offense Level:	38	Amended Offense Level:	36
Criminal History Category:	II	Criminal History Category:	II
Previous Guideline Range:	322 to 387 months	Amended Guideline Range:	270 to 322 months

II. SENTENCE RELATIVE TO AMENDED GUIDELINE RANGE

X The reduced sentence is within the amended guideline range.

☐ The previous term of imprisonment imposed was less than the guideline range applicable to the defendant at the time of sentencing as a result of a departure or Rule 35 deduction, and the reduced sentence is comparably less than the amended guideline range.

☐ Other (explain):

III. ADDITIONAL COMMENTS

This sentence shall consist of 210 months at each of Counts One and Four, to be served concurrently, and 60 months at Count Two, to be served consecutive to the term imposed at Counts One and Four.

Except as provided above, all provisions of the judgment dated 11-19-1993 shall remain in effect.

IT IS SO ORDERED.

Order Date: 6/11/08 /s/ Alan Bloch
Judge's signature

Effective Date:_____
(if different from order date)

Alan N. Bloch, United States District Judge
Printed name and title

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 08-3397

UNITED STATES OF AMERICA,

v.

PERCY DILLON,

Appellant

On Appeal from the United States District Court
for the Western District of Pennsylvania
(D.C. Criminal No. 93-cr-0084)
District Judge: Honorable Alan N. Bloch

Submitted Under Third Circuit L.A.R. 34.1(a)
May 19, 2009

Before: FUENTES, JORDAN, and
NYGAARD, *Circuit Judges.*

(Opinion Filed: June, 10, 2009)

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Elisa A. Long, Esq.
Renee Pietropaolo, Esq.
Office of Federal Public Defender
1001 Liberty Avenue
1450 Liberty Center
Pittsburgh, PA 15222

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OPINION OF THE COURT

FUENTES, *Circuit Judge*:

Percy Dillon appeals the District Court's partial denial of his motion to reduce his sentence pursuant to 18 U.S.C. § 3582(c)(2). In 2008, the United States Sentencing Commission amended the United States Sentencing Guidelines ("Guidelines"), retroactively reducing the base offense level for crack cocaine offenses. The District Court subsequently entered an order reducing Dillon's sentence by two-levels, but held that it lacked authority to reduce Dillon's sentence further. Dillon argues that the District Court erred in failing to recognize that *United States v. Booker*, 543 U.S. 220 (2005) gave it such authority. For the reasons that follow, we will affirm.[1]

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[1] We exercise jurisdiction pursuant to 28 U.S.C.A. § 1291. We review de novo the district court's determination of the scope of its authority to reduce a sentence under 18 U.S.C. § 3582.

(Continued on following page)

I.

If *Booker* did apply in proceedings pursuant to § 3582, Dillon would likely be an ideal candidate for a non-Guidelines sentence. In 1993, Dillon was convicted of conspiracy to distribute more than 500 grams of cocaine and more than 50 grams of cocaine base in violation of 21 U.S.C. § 846; use of a firearm during a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1); and possession with intent to distribute more than 500 grams of cocaine in violation of 21 U.S.C. § 841(a)(1).

At the time, the District Court calculated Dillon's offense level to be 38 and his criminal history category to be II. Dillon received two criminal history points: one for misdemeanor marijuana possession and one for misdemeanor resisting arrest. Thus, Dillon's Guidelines range was 322 to 387 months.[2]

The District Court sentenced Dillon to the bottom of the Guidelines range, 322 months. However, the District Court repeatedly stated that it was constrained by the Guidelines to impose what it believed to be an unreasonable sentence. At Dillon's original sentencing hearing, the District Court noted: "I personally don't believe that you should be serving

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United States v. Fanfan, 558 F.3d 105, 107 (1st Cir. 2009); *cf. United States v. Doe*, 564 F.3d 305, 307 n.2 (3d Cir. 2009).

[2] This Guidelines range includes the mandatory consecutive 60-month sentence for the firearms offense. *See* 18 U.S.C. § 924(c)(1).

322 months[, b]ut I feel I am bound by those Guidelines . . . " App. at 99. The District Court continued: "I don't say to you that these penalties are fair. I don't think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime." *Id.* The District Court also noted that it believed Dillon's sentence to be unreasonable in its Statement of Reasons: "[T]he guidelines range is unfair to the defendant. The Court, however, is bound by the guidelines range." App. at 5.

Following the change in the crack cocaine offense level, Dillon filed a *pro se* motion for a sentence reduction. The District Court recalculated Dillon's offense level to be 36 and reduced Dillon's sentence to 270 months. Dillon argued that the District Court should apply *Booker* in resentencing him, but the District Court found that *Booker* did not apply and that it lacked jurisdiction to grant more than a 2-level sentence reduction.

II.

A court generally may not modify a term of imprisonment once it has become final. 18 U.S.C. § 3582(c). However, 18 U.S.C. § 3582(c)(2) provides that:

> in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o) . . . the court may

> reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

In *Booker*, the Supreme Court concluded that the Sixth Amendment requires a jury to find the facts that establish a mandatory floor for a defendant's sentence. 543 U.S. at 229, 244. Following *Booker*, a sentencing court must calculate a defendant's Guidelines range, but may only use that range as a starting point for determining a reasonable sentence based on an individualized assessment of the factors set forth at 18 U.S.C. § 3553(a). *Gall v. United States*, 128 S. Ct. 586, 596-97 (2007). Dillon argues that a district court adjusting a sentence pursuant to § 3582(c) must also treat the amended Guidelines range as advisory, and impose a sentence based on the procedures set forth in the *Booker* line of cases.

We have held that *Booker* does not affect eligibility for a § 3582(c) sentence reduction. *See, e.g.*, *United States v. Doe*, 564 F.3d 305, 313-14 (3d Cir. 2009) (holding that defendants who received substantial assistance departures below the statutory mandatory minimum were not eligible for reduction); *United States v. Mateo*, 560 F.3d 152, 155 (3d Cir. 2009) (holding that defendant sentenced based on career offender Guidelines range was not eligible for reduction as a result of the crack cocaine amendment).

Though we have not yet written precedentially on whether *Booker* gives a district court authority to give a defendant who *is* eligible for a sentence reduction under § 3582 an additional reduction, our reasoning in the eligibility cases also applies in this context.[3] In the context of *eligibility* for a § 3582 sentence reduction we explained that:

> Nowhere in *Booker* did the Supreme Court mention § 3582(c)(2). Because § 3582(c)(2) proceedings may only reduce a defendant's sentence and not increase it, the constitutional holding in *Booker* does not apply to § 3582(c)(2). *See Booker*, 543 U.S. at 244. Additionally, the remedial holding in *Booker* invalidated only 18 U.S.C. § 3553(b)(1), which made the Sentencing Guidelines mandatory for full sentencings, and § 3742(e), which directed appellate courts to apply a *de novo* standard of review to departures from the Guidelines. Therefore, *Booker* applies to full sentencing hearings –

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[3] Our decision in *United States v. Styer*, No. 08-2951, 2009 U.S. App. Lexis 6240 (3d Cir. Mar. 25, 2009) does not relate to this issue. *Styer* does not cite *Booker* and does not discuss the scope of a district court's jurisdiction under § 3582, except to acknowledge that "courts are constrained to consider only the retroactive amendment at issue." *Id.* at *5. Instead, in *Styer*, we reviewed for reasonableness the district court's decision not to resentence Styer after the Guidelines under which he was originally sentenced were reduced. Reasonableness review of a district court's discretionary decision at a § 3582 proceeding does not constitute a holding on how *Booker* applies at these proceedings.

whether in an initial sentencing or in a resentencing where the original sentence is vacated for error, but not to sentence modification proceedings under § 3582(c)(2). Not only are sentence modification proceedings sanctioned under a different section of the statute than those at issue in *Booker*, but the *Booker* court held that "[w]ith these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements." *Booker*, 543 U.S. at 259. Section 3582(c)(2) contains no cross-reference to § 3553(b) and therefore was not affected by *Booker*. Nor is there anything else in *Booker* that directly addresses § 3582(c) proceedings.

. . . .

Nothing in *Booker* purported to obviate the congressional directive in § 3582(c)(2) that a sentence reduction pursuant to that section be consistent with Sentencing Commission policy statements. The language of § 3582(c)(2) could not be clearer: the statute predicates authority to reduce a defendant's sentence on consistenc[y] with the policy statement, and the policy statement provides that a reduction is not consistent if the amendment does not have the effect of lowering the defendant's applicable Guideline range. The Guidelines are no longer mandatory, but that does not render optional statutory directives.

. . . .

> Because U.S.S.G. § 1B1.10 is binding on the District Court pursuant to § 3582(c)(2), the District Court correctly concluded that it lacked the authority to further reduce the Appellants' sentences.

Doe, 564 F.3d at 312-14 (internal citations and quotation marks omitted). For the same reasons, we conclude that *Booker* does not apply to the size of a sentence reduction that may be granted under § 3582(c)(2).

In doing so, we are joined by the overwhelming majority of our sister Courts of Appeals. *See United States v. Fanfan*, 558 F.3d 105, 110 (1st Cir. 2009) (holding that *Booker* does not apply in the context of § 3582(c)(2)); *United States v. Savoy*, ___ F.3d ___, 2009 WL 1457976, at *2-3 (2d Cir. 2009) (per curiam) (same); *United States v. Dunphy*, 551 F.3d 247, 254 (4th Cir. 2009) (same); *United States v. Cunningham*, 554 F.3d 703, 707 (7th Cir. 2009) (same); *United States v. Starks*, 551 F.3d 839, 842 (8th Cir. 2009) (same); *United States v. Rhodes*, 549 F.3d 833, 840 (10th Cir. 2008) (same); *United States v. Melvin*, 556 F.3d 1190, 1192 (11th Cir. 2009) (per curiam) (same); *but see United States v. Hicks*, 472 F.3d 1167, 1171-72 (9th Cir. 2007) (holding that *Booker* abolished the mandatory nature of the Guidelines in all contexts).

Dillon also argues that the District Court erred in calculating his criminal history score. However, the District Court had no authority to reconsider its prior

criminal history determination. *See, e.g.*, *Mateo*, 560 F.3d at 156.

III.

Because *Booker* does not apply in § 3582(c)(2) proceedings, the District Court did not err in denying Dillon's motion for a reduction below his new Guidelines range. We will affirm the judgment of the District Court.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

December 7, 2009

Ms. Renee Domenique Pietropaolo
1500 Liberty Center
1001 Liberty Avenue
Pittsburgh, PA 15222-3714

Re: Percy Dillon
v. United States
No. 09-6338

Dear Ms. Pietropaolo:

The Court today entered the following order in the above-entitled case:

The motion of petitioner for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted.

Sincerely,

/s/ William K. Suter
William K. Suter, Clerk

The following newspaper article was filed in the case of United States v. Percy Dillon, in the District Court for the Western District of Pennsylvania, Criminal No. 93-84, at Docket Entries 193 and 202, and in the United States Court of Appeals for the Third Circuit, No. 08-3397, in Volume II of that Appendix.

Tribune-Review

SATURDAY, NOV. 20, 1993

Judge: Guidelines force him to impose unfair sentences

By Ruth Hawk
TRIBUNE REVIEW

A federal judge reluctantly imposed harsh prison terms on two drug dealers Friday even though he maintains the severity of their crime doesn't warrant the lengthy terms.

"The penalties are entirely too high for the crime you've committed – even though it was a serious crime," U.S. District Court Judge Alan N. Bloch told the pair. But he said his hands were bound by the mandatory federal sentencing guidelines.

Percy Dillon, 23, of San Francisco, was sentenced to 26 years and 10 months while Jerron "J-Run" Lollis, 24, of Gardenia, Calif. was sentenced to 20 years and 8 months.

"I am bound to these guidelines although I consider it to be unfair to you," the judge said.

In September the two were convicted in a drug conspiracy that involved mailing large quantities of crack and powder cocaine across the country.

During the conspiracy, the men helped bring about seven kilograms of crack and more than four kilos of cocaine into the Pittsburgh, New Kensington and Harmarville areas, according to Assistant U.S. attorney Joseph Yablonski.

The disparities between the sentences imposed for crack and powder cocaine were key issues at the sentencing hearing. Under federal law, 50 grams of crack gets a person a mandatory 10-year sentence, while the same amount of powder cocaine requires only a one-year sentence. Congress passed the law in 1986, about the time when crack emerged in popularity.

The 100 to 1 ratio – that counts one gram of crack as equal to 100 grams of powder cocaine – angered attorney Gary Zimmerman. "The sentence is totally unfair," Zimmerman, who represents Lollis, said.

He charged that the 100 to 1 ratio is biased against his client because of his race. Civil rights activists claim the disparity is racially discriminatory because about 92 percent of the federal crack defendants are black.

The U.S. Sentencing Commission, which sets rules for federal judges, is reviewing whether the crack cocaine law discriminates against blacks. U.S. Attorney General Janet Reno has ordered a Justice Department study of whether the law should be changed.

Others involved in drug conspiracy were Eric Williams, 32, of New Kensington, and Stephanie Hawes, 23 of Monroeville.

Williams, who helped set up the local drug ring, was originally sentenced to five years in prison. After cooperating with the government, his sentence was reduced to 30 months. Hawes had also received a five-year prison term, but based on her cooperation she served only two months in prison.

Another co-conspirator, Mallik Wade, of Long Beach, Calif. has never been apprehended. He is wanted in connection with the drug conspiracy and for allegedly holding a gun to a woman's temple while demanding to know the whereabouts of some cocaine.

The following newspaper article was filed in the case of United States v. Percy Dillon, in the District Court for the Western District of Pennsylvania, Criminal No. 93-84, at Docket Entries 193 and 202, and in the United States Court of Appeals for the Third Circuit, No. 08-3397, in Volume II of that Appendix.

NewsBank Inc., America's Newspapers

LEGALIZE DRUGS? MAYBE DECRIMINALIZATION IS NO LONGER UNTHINKABLE, ACLU PANELISTS AGREE

Pittsburgh Post-Gazette (PA) – Monday, February 7, 1994

Author: *STEVE TWEDT, POST-GAZETTE STAFF WRITER*

The legalization of drugs should be studied because other approaches to curb drug-related crimes have failed, a U.S. district judge and a city police commander said yesterday.

Judge Alan N. Bloch, speaking at the annual meeting of the American Civil Liberties Union's Pittsburgh chapter in Oakland, said he would have opposed such a notion just a few years ago.

But "most judges I come in contact with feel we're not going anywhere in the drug area at all," Bloch said, "I don't know what the answer is, and I don't know that

legalizing drugs is the answer. But I do think it's worth studying."

Fellow panelist Pittsburgh police Cmdr. Gwen Elliott, who is assistant to the mayor for youth policy, said she had had a similar change of heart.

"Even two years ago, I would have said, 'No way.' But I think we have to look at some of the studies and see what other countries are doing."

They and Gene Guerrero, field director for the ACLU's Washington, D.C., office, spoke on the topic, "Drugs, Safe Streets and the Constitution: Must We Trade Freedom for Security?" at the University of Pittsburgh School of Law.

Guerrero said the United States had five times the number of murders as Europe and six times as many rapes. In his own life, two of his friends have been murdered, his homes in Atlanta and now Washington have been burglarized a dozen times and his car has been stolen twice.

"I want to stop these things from happening."

If disagreeing on some of the particulars, all three panelists agreed that the current approach was not working.

Prisons are filled with nonviolent offenders jailed under mandatory minimum sentence laws or tough sentencing guidelines, Guerrero said.

By contrast, countries like the Netherlands have stopped enforcing laws for marijuana use and distribution and "they've had relatively little drug-related crime," Guerrero said.

He said the U.S. system "increases the chances that a minor offender will become a major offender."

Bloch, too, said most judges objected to mandatory minimum sentences, which he said remove a judge's discretion in individual cases.

He cited three examples of cases he has presided over, including one in which Percy Dillon, 23, of San Francisco, was sentenced in November to 26 years and 10 months in prison for dealing in cocaine. Bloch said he was bound under federal sentencing guidelines to give the stiff sentence.

"I felt terrible about it," he said yesterday. "I was basically taking the rest of his life away."

Bloch said he believed whatever good prison might have done for Dillon – who, he said, came from a good family – could be accomplished in five years.

In some cases, Elliott pointed out, murderers serve less time than drug dealers.

Rather that [sic] hiring more police officers, handing down harsher sentences and building more prisons to accommodate offenders, Guerrero said, the nation should "work against crime at the front end rather than weaken fundamental liberties."

Elliott said the city wanted to provide job opportunities for youth, as well as education and recreation. And there need to be more drug treatment programs, with better access to them, she said.

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PETITIONER'S BRIEF

B 713
Supreme Court, U.S.
FILED
JAN 25 2010
OFFICE OF THE CLERK

No. 09-6338

In The Supreme Court of the United States

PERCY DILLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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BOTH SCBWB

QUESTIONS PRESENTED

I. Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.

II. Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

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OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit (J.A. 47-55), is reported at 572 F.3d 146.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Third Circuit entered its judgment on June 10, 2009. The petition for a writ of certiorari was filed on September 1, 2009, and granted on December 7, 2009. The jurisdiction of this Court rests on 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULES INVOLVED

The Questions Presented implicate the Sixth Amendment to the United States Constitution, which provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury. . . ."

The relevant portions of the Sentencing Reform Act, as amended, 18 U.S.C. §§ 3553(a), 3582, other pertinent sections of the United States Code, including 18 U.S.C. § 3742 and 28 U.S.C. § 994, and of the United States Sentencing Guidelines, USSG § 1B1.10, are included as a Statutory Addendum to this brief.

STATEMENT OF THE CASE

1. At age twenty-three, Percy Dillon was convicted at trial of conspiracy to distribute and possess with the intent to distribute in excess of 500 grams of powder cocaine and in excess of fifty grams of crack cocaine; possession with intent to distribute in excess of 500 grams of powder cocaine; and use of a firearm during and in relation to a drug trafficking crime.[1] (J.A. 15, 49; Docket Entry 19.) The jury verdict authorized a maximum sentence of 195 months (sixteen years, three months).[2]

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[1] *See* Comprehensive Drug Abuse Prevention and Control Act §§ 401(a)(1), 406 and 902(c)(1), 21 U.S.C. §§ 841(a)(1), 846 and 18 U.S.C. § 924(c)(1) (1988).

[2] Under the Guidelines in effect at the time of sentencing, the maximum sentence authorized by the jury verdict was 135 months for the drug offenses, plus a mandatory consecutive sentence of sixty months for the firearms offense. The jury verdict established that Mr. Dillon was accountable for an amount of powder cocaine in excess of 500 grams, and an amount of crack cocaine in excess of fifty grams. The Guidelines require that each drug be converted to its marijuana equivalency to create a total combined offense level. USSG § 2D1.1, comment (n.10). Using 501 grams of powder cocaine and fifty-one grams of crack cocaine, for ease of calculation, these equal 100.2 kilograms of marijuana, and 1020 kilograms of marijuana respectively, for a combined total of 1,120.2 kilograms of marijuana, *id.*, and an offense level of thirty-two. USSG § 2D1.1(a)(3). After applying the two-level reduction for Acceptance of Responsibility under USSG § 3E1.1, Mr. Dillon's final offense level would have been thirty. At Criminal History Category II, the Category used by the District Court, Mr. Dillon's Guidelines range would have been 108 to 135 months imprisonment. Given the mandatory minimum ten-year sentence under 21 U.S.C. § 841(b)(1)(A)(iii),

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At sentencing, the district court applied the then-mandatory United States Sentencing Guidelines ("Guidelines") and made factual findings about matters not presented to or proved beyond a reasonable doubt to the jury. Specifically, the district court found Mr. Dillon was responsible for 1.5 kilograms of crack cocaine and 1.6 kilograms of powder cocaine, which set the base offense level under USSG § 2D1.1 at thirty-eight. (Docket Entry 53 pp. 4, 10.) The court further found that he recklessly created a substantial risk of death or serious bodily injury to another person in the course of fleeing from a law enforcement officer under USSG § 3C1.2. (Docket Entry 53 pp. 6-7.) That finding increased Mr. Dillon's offense level by two levels, to forty. The court then reduced the offense level by two levels, under USSG § 3E1.1, after finding that Mr. Dillon clearly demonstrated acceptance of responsibility. (J.A. 10; Docket Entry 56.) The court also concluded that Mr. Dillon fell within Criminal History Category II based on two prior misdemeanor convictions for marijuana possession and resisting arrest. (J.A. 74-75, PSR ¶¶44-47.) Based on the district court's findings, and Mr. Dillon's criminal history, the mandatory Guidelines range was

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Mr. Dillon's actual Guidelines range would have been 120 to 135 months imprisonment, to be followed by the additional mandatory minimum sixty months for the firearms offense under § 924(c) and USSG § 2K2.4(a).

322 to 387 months.[3] The district court sentenced Mr. Dillon to the low end of that range, 322 months (twenty-six years, ten months). (J.A. 21, 49.)

When sentencing Mr. Dillon, the judge explained that he was constrained by the Guidelines to impose what he considered to be an unreasonably severe sentence: "The crimes you were convicted of are very serious crimes; however, I personally don't believe that you should be serving 322 months. But I feel I am bound by those Guidelines . . . ." (J.A. 12-13, 49-50.) The court reiterated its dissatisfaction with the Guidelines before imposing sentence, telling Mr. Dillon, "I don't say to you that these penalties are fair. I don't think they are fair. I think they are entirely too high for the crime you have committed even though it is a serious crime."[4] (J.A. 13, 50.) The

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[3] This Guidelines range includes the mandatory consecutive sixty-month sentence for the firearms offense. *See* 18 U.S.C. § 924(c)(1); USSG § 2K2.4(a) (1993). (J.A. 49.)

[4] On the face of the judgment, the district court memorialized its view that the Guidelines were too harsh: "While the Court considers the defendant's offenses serious, it also believes that the guidelines range is unfair to the defendant. The Court, however, is bound by the guidelines range." (J.A. 22, 50.)

In public comments made shortly after the sentencing, the district court judge who sentenced Mr. Dillon explained that he believed a five-year sentence would have been sufficient: "[W]hatever good prison might have done for Dillon who . . . came from a good family – could be accomplished in five years." (J.A. 62; Docket Entry 193, Exhibit D-1.) Two years later, at a status conference held on a remand, the court again expressed its view that the sentences imposed on Dillon and his co-defendant were unreasonably long: "It disturbed me greatly

(Continued on following page)

court expressed "hope that while [Mr. Dillon is] in prison, which will be a very long, considerable period of time, that you will take some time to consider the direction that your life will take when you return to society. I don't know if there is any way, but I would hope that if you have friends and family in your community at home, you will convey to them the seriousness of the penalties for dealing in drugs. It is only through people like you, if you spread the word that other young men of your age will hesitate to get involved in it." (J.A. 13.)

2. While incarcerated, Percy Dillon did what the district court judge asked and more. He matured into a leader and worked to educate himself and others. (*See, e.g.*, Appendix filed November 25, 2008 in the Court of Appeals for the Third Circuit, *United States v. Percy Dillon*, No. 08-3397 ("App.") at 101-08, 148-50, 150a-b, 151-52, 154-56, 156a, 159, 163.) "Eager [ ] to help other young men in the community understand his perils and hopefully reach some before they [too fell] victim" (App. 152a-b, 156), Mr. Dillon has been "relentless" in his efforts to "encourag[e] and motivat[e] the generation that [succeeds] him." (App. 151.) He has reached out to juvenile offenders at Pike County Juvenile Detention Center, in Mississippi, encouraging them with literature to take a path away from crime. (App. 156.)

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when I sentenced these two. There's no doubt about their guilt . . . but the length of the sentences disturbed me greatly. I had to follow the law . . . ." (Docket Entry 97, pp. 16-17, 18.)

Mr. Dillon also has worked tirelessly with the Executive Director of Hunters Point Family, a nationally recognized youth development agency that serves high-risk youth and families in San Francisco's Bayview Hunters Point – the community in which Mr. Dillon grew up. Working with the University of California at Berkeley and San Francisco State, Mr. Dillon helped establish an African-American studies program at Hunters Point Family to "educate [local] youth about their rich heritage and uplift them." (App. 148.) "The program has been very successful and continues today as part of [the] Young Men's Leadership Institute." (App. 148-49.)

And, in conjunction with the University of California at Berkeley, Mr. Dillon helped create an African-American Studies program for inmates at the United States Penitentiary at Atwater. (App. 150a-b, 151-52.) Berkeley's Prison Outreach Coordinator credits Mr. Dillon for the success of the program: "without his insight and advice, our project would not have succeeded and grown the way it has." (App. 150a-b.)

Not only has Mr. Dillon striven to enrich the lives of at-risk youth and fellow inmates, he has taken advantage of opportunities to further his own education. After obtaining his GED in prison, he pursued vocational training through a nationally accredited distance education program. *See* http://www.ashworthcollege.edu. Focusing on skills that will help him upon release from prison, Mr. Dillon graduated in 2004 from the Professional Career Development

Institute, completing its Professional Property Management Program. (App. 134-36, 138, 139-47.) Mr. Dillon's efforts have paid off, as he has job prospects awaiting him should he be released from prison. (App. 161, 152b.)

Throughout his more than fifteen years of incarceration, Mr. Dillon has enjoyed strong family support, which will ease his transition into the community upon release and help ensure successful reentry. (Docket Entry 56, Exhibits; App. 153-54, 156a, 161-63.) *See generally* Damian Martinez, *Family Connections and Prisoner Reentry* (April 2009).[5]

3. After Mr. Dillon had served twelve years of his nearly twenty-seven year sentence, this Court decided *United States v. Booker*, 543 U.S. 220 (2005), holding that the mandatory Guidelines violated the Sixth Amendment, and rendering the Guidelines advisory.

Booker had plain implications for defendants in crack cocaine cases. Relying on the United States Sentencing Commission's ("Commission") Reports to Congress in 1995, 1997, 2001, 2002 and 2007, which found that the 100:1 powder to crack cocaine ratio resulted in sentences that were greater than necessary to satisfy sentencing purposes and created unwarranted disparity, many of those defendants urged courts to reject the Guidelines' adoption of the

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[5] *Available at* http://ccj.asu.edu/downloads/paper-martinez.

ratio and to impose a sentence below the advisory Guidelines range.[6] *See, e.g.*, *United States v. Eura*, 440 F.3d 625 (4th Cir. 2006); *United States v. Pho*, 433 F.3d 53 (1st Cir. 2006), *both abrogated by Kimbrough v. United States*, 552 U.S. 85 (2007). As summarized in the Commission's May 2007 Report, the quantity-based penalties for crack cocaine "overstate the relative harmfulness of crack cocaine compared to powder cocaine," "sweep too broadly and apply most often to lower level offenders," "overstate the seriousness of most crack offenses and fail to provide adequate proportionality," and their "severity . . . mostly impacts minorities."[7]

4. On May 1, 2007, seeking to "somewhat alleviate" the "urgent and compelling . . . problems associated with the 100-to-1 drug quantity ratio," the

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[6] Even before *Booker*, many defendants, including Mr. Dillon, challenged the ratio under the Equal Protection Clause, the Due Process Clause and the Eighth Amendment. (*United States v. Dillon*, Joint Brief of Appellants filed in the Court of Appeals for the Third Circuit, Nos. 93-3615, 93-3619, *available at* 1994 WL 16176787; *see* Docket No. 53 (district court overruling equal protection objection and not reaching due process challenge)). These arguments were unsuccessful. *See, e.g.*, *United States v. Frazier*, 981 F.2d 92 (3d Cir. 1992) (rejecting equal protection and Eighth Amendment challenges to crack to powder cocaine ratio); *United States v. Byse*, 28 F.3d 1165 (11th Cir. 1994) (rejecting equal protection and due process challenges to crack ratio; listing other circuits to have rejected equal protection arguments).

[7] U.S. Sentencing Commission Report to Congress: *Cocaine and Federal Sentencing Policy* 8 (2007) ("2007 Report").

Commission submitted to Congress an amendment to reduce base offense levels for most crack cocaine offenses by two levels. *See* 72 Fed. Reg. 28,558, 28,572-573 (May 21, 2007); 2007 Report at 9. The amendment was "only . . . a partial remedy" and "neither a permanent nor complete solution," but corrected for "the manner in which [the Commission] constructed . . . the Drug Quantity Table in USSG § 2D1.1," which "contribute[d] to the problems" by setting base offense levels two levels above the statutory mandatory minimum penalties. 2007 Report at 9-10. The amendment became effective, prospectively, November 1, 2007.[8]

Before the Commission reached a decision whether to make the amendments to the crack cocaine Guidelines retroactive, this Court decided *Kimbrough*, upholding the district court's decision, pursuant to the advisory Guidelines regime established in *Booker*, to impose a sentence based on a 20:1 ratio rather than the 100:1 ratio reflected in the pre-amendment Guidelines. In doing so, this Court

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[8] USSG, App. C, Amend. 706 (Nov. 1, 2007). Amendment 706 was further amended by Amendment 711, which also became effective November 1, 2007. Amendments 706 and 711 were made retroactive effective March 3, 2008. USSG, App. C, Amend. 713 (Mar. 3, 2008). These amendments were further amended by Amendment 715, which became effective May 1, 2008, and was made retroactive by Amendment 716 on the same date. Amendments 711 and 715 made adjustments in the method for converting crack cocaine to an equivalent quantity of marijuana in cases involving more than one drug.

rejected the government's argument that the Anti-Drug Abuse Act of 1986 required the drug Guidelines to be calibrated to the quantity-based mandatory minimum penalties, *Kimbrough*, 552 U.S. at 102-05, and confirmed that district courts may vary from Guidelines ranges based on policy considerations, including disagreements with the Guidelines. *Id.* at 101-02; *see also Rita v. United States*, 551 U.S. 338, 351 (2007) (holding that district court may consider arguments that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations"). The Court concluded that the district court did not abuse its discretion in finding that the crack Guidelines yielded a sentence greater than necessary to achieve § 3553(a)'s purposes in an ordinary case, like Mr. Kimbrough's. *Kimbrough*, 552 U.S. at 110.

This Court reached that conclusion after reviewing evidence, set forth in several of the Commission's reports to Congress, showing that the Guidelines based on the 100:1 powder to crack ratio in the Anti-Drug Abuse Act of 1986 were disproportionately severe for the seriousness of the offense in most cases and resulted in unwarranted disparity and disrespect for law. *Id.* at 94-100. Regarding the amendments reducing Guidelines ranges by two levels that had taken effect November 1, 2007, the Court observed that the amended ranges were still keyed to the mandatory minimums, still yielded sentences between two and five times longer than offenses involving equal amounts of powder, and were only a partial remedy. *Id.* at 100 & nn.10-11.

The day after *Kimbrough* was decided, the Commission voted to make the amendments to the crack cocaine Guidelines retroactive, and also to amend USSG § 1B1.10, p.s., in what would become Amendment 712.[9]

5. Section 1B1.10 addresses motions under 18 U.S.C. § 3582(c)(2). Section 3582(c)(2), which was enacted as part of the original Sentencing Reform Act ("SRA"), authorizes the district court to reduce a term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission, pursuant to 28 U.S.C. § 994(o)," and directs the court, in deciding whether and by how much to reduce the term of imprisonment, to "consider[] the factors set forth in section 3553(a) to the extent that they are applicable" and to be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2).

Prior to Amendment 712, USSG § 1B1.10 addressed the court's authority to entertain a motion under 18 U.S.C. § 3582(c)(2) by stating that a reduction in the term of imprisonment was "authorized" only if the applicable Guidelines range "has subsequently been lowered" by an amendment "listed in subsection (c)." *See* USSG § 1B1.10(a), p.s. (2007); *see*

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[9] 73 Fed. Reg. 217 (Jan. 2, 2008); USSG, App. C, Amend. 712 (Mar. 3, 2008).

also id., comment. (n.1) ("Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range."). The prior version addressed the resentencing decision by stating:

> In determining whether and to what extent a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

See USSG § 1B1.10(b), p.s. (2007); *see also id.*, comment. (n.3) (Except that "in no case shall the term of imprisonment be reduced below time served . . . the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.").

Amendment 712 changed USSG § 1B1.10 in several significant ways, some of which are relevant here. As an initial matter, USSG § 1B1.10, now speaks in mandatory terms, stating that "any such reduction *shall* be consistent with this policy statement," USSG § 1B1.10(a)(1), p.s. (2008) (emphasis supplied), and refers to "18 U.S.C. § 3582(c)(2) and this policy statement" as equivalent authority, *id.*, USSG § 1B1.10(a)(3), (b)(1), (b)(2)(A), p.s. Section

1B1.10 also asserts that the amended Guidelines range is binding, instructing that "the court *shall not* reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range." *See* USSG § 1B1.10(b)(2)(A), p.s. (2008) (emphasis added). It also explicitly forbids courts from giving full effect to consideration of the factors set forth in § 3553(a), including post-sentence conduct, where those factors warrant a sentence below the minimum of the amended Guidelines range. *See id.*, comment. (n.1(B)).[10]

6. After the Commission promulgated the crack amendment, but before it voted to make the amendment retroactive, Mr. Dillon filed a *pro se* motion for a reduction in his term of imprisonment under § 3582(c)(2). (Docket Entry 206.) He sought a two-level reduction based on Amendment 706 and argued that his sentence should be further reduced under *Booker* and 18 U.S.C. § 3553(a). (Docket Entries 206, 208, 209.) Had Mr. Dillon's sentence been based on the one-to-one ratio between crack and

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[10] The amended background commentary states that the new USSG § 1B1.10 seeks to provide "guidance and limitations," USSG § 1B1.10, comment. (backg'd), p.s. (2008), where the former policy statement sought only to provide "guidance[,]" USSG § 1B1.10, comment. (backg'd), p.s. (2007). One pertinent limitation appears in subsection (a)(3), which announces that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." USSG § 1B1.10(a)(3), p.s.

powder cocaine, as he requested at his original sentencing, (Docket Entry 52 pp. 5-6, 14, Docket Entry 53 p. 10; *see* J.A. 8-9), the Guidelines range would have been 147 to 168 months.[11] Because he faced statutory mandatory minimum sentences under §§ 841(a)(1) and 924(c)(1), he would have been sentenced to 180 months.

Mr. Dillon also asked the court to revisit his criminal history category or depart under USSG § 4A1.3. (Docket Entry 206.) The district court held the motion in abeyance pending a decision by the Commission on retroactivity. (Docket Entry 206, Order entered December 7, 2007.) On January 7, 2008, Mr. Dillon filed a *pro se* letter request to amend his motion, relying on *Kimbrough* as further support for a sentence below the amended Guidelines range. (J.A. 30-31.)

After the decision to make the crack amendment retroactive became effective, the district court decided

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[11] Treating crack cocaine as powder results in a total combined drug quantity of 3.1 kilograms cocaine. Under the Drug Quantity Table set forth in USSG § 2D1.1, between 2 kilograms and 3.5 kilograms of cocaine results in an offense level of twenty-eight. After reducing the Offense Level by two for Acceptance of Responsibility, USSG § 3E1.1, and increasing it by two for his judge-found reckless endangerment during flight, USSG § 3C1.1, Mr. Dillon's final offense level would be twenty-eight. At Criminal History Category II, Mr. Dillon's Guidelines range for the drug counts would be 87 to 108 months, and 147 to 168 months after factoring in the consecutive sixty months for the gun count.

that Mr. Dillon was eligible for a reduction in his term of imprisonment. In resentencing him, the court recalculated his Guidelines range as instructed by the newly revised USSG § 1B1.10(b)(1), p.s. (2008). (J.A. 32.) Using its 1993 fact findings regarding drug quantity, the court found that the new base offense level under USSG § 2D1.1 was thirty-six. (J.A. 34-36.) Again using its prior fact findings regarding reckless endangerment during flight, two levels were added under USSG § 3C1.2, and two were subtracted for acceptance of responsibility under USSG § 3E1.1. The amended Guidelines range, based on Mr. Dillon's criminal history score and including the mandatory consecutive sixty-month sentence for the firearms conviction, was 270-322 months. (J.A. 35-36.) Notwithstanding its statements at the original sentencing that a much shorter sentence was sufficient, and the substantial additional mitigating evidence of Mr. Dillon's post-sentencing conduct, the district court declared itself bound by USSG § 1B1.10, and sentenced Mr. Dillon to 270 months imprisonment (twenty-two years, six months). (J.A. 37-41.) The court stated that "it would be patently inconsistent" with the policy statement "to impose a term of imprisonment lower than the bottom of the amended Guideline range." (J.A. 39-40.) The court observed: "Indeed, the amendments to Section 1B1.10 appear to have been enacted specifically to prevent the application of *Booker* to Section 3582(c)(2) proceedings." (J.A. 40.)

The district court also refused to revisit Mr. Dillon's criminal history category, finding that "neither Section 1B1.10 nor Section 3582(c)(2) permit this Court to re-examine any of the prior convictions which formed the basis of the Court's original guideline determinations." (J.A. 41-42.)

7. Mr. Dillon appealed the district court's failure to reduce his term of imprisonment below the amended Guidelines range and also challenged the sentence imposed as unlawful because it was based on an incorrect calculation of his criminal history score. (Brief for Appellant filed November 25, 2008 in the Court of Appeals for the Third Circuit, *United States v. Percy Dillon*, No. 08-3397.) The Third Circuit affirmed. It acknowledged that "[i]f *Booker* did apply in proceedings pursuant to § 3582, Dillon would likely be an ideal candidate for a non-Guidelines sentence," (J.A. 49), but found that the district court "'correctly concluded that it lacked the authority to further reduce the Appellant['s] sentence [] . . . [b]ecause USSG § 1B1.10 is binding on the District Court pursuant to 3582(c)[.]'" (J.A. 54 (quoting *United States v. Doe*, 564 F.3d 305, 312-14 (3d Cir. 2009)).) The court also rejected Mr. Dillon's argument that the district court committed procedural error by failing to correctly calculate his criminal history score, finding that "the District Court had no authority to reconsider its prior criminal history determination." (J.A. 54-55.)

In the Third Circuit's view, *Booker's* constitutional holding did not apply to § 3582(c)(2) proceedings because "[n]owhere in *Booker* did the Supreme Court mention § 3582(c)(2)," and "§ 3582(c)(2) proceedings may only reduce a defendant's sentence and not increase it." (J.A. 52 (quoting *United States v. Doe*, 564 F.3d 305, 312-14 (3d Cir. 2009) (internal citations and quotation marks omitted)).) In addition, the Third Circuit concluded *Booker's* remedial holding was likewise inapplicable because *Booker* applies only to "full sentencing hearings . . . but not to sentence modification proceedings under § 3582(c)(2)." (J.A. 52-53.) The Third Circuit noted this Court's statement in *Booker* that "[w]ith these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the [SRA] satisfies the Court's constitutional requirements," suggesting that § 3582(c)(2) must therefore have survived constitutional scrutiny. (J.A. 53.) This Court granted *certiorari*. (J.A. 56.)

SUMMARY OF ARGUMENT

In resentencing Mr. Dillon under 18 U.S.C. § 3582(c)(2), the district court felt constrained to impose a sentence within the amended Guidelines range and believed it could not revisit any of its prior Guidelines decisions. Such constraint is neither required nor permitted. After *United States v. Booker*, 543 U.S. 220 (2005), district courts cannot be forced

to adhere to an unconstitutional and unjust Guidelines range when imposing a new sentence under § 3582(c)(2). A Sentencing Commission policy statement, revised in response to *Booker*, attempts to do exactly that. Following that policy statement, USSG § 1B1.10, the district court adopted an amended Guidelines range that incorporated the Sixth Amendment error dating from the mandatory-Guidelines era, and failed to correct the an erroneous criminal history calculation that increased Mr. Dillon's original sentence separate and apart from the Sixth Amendment error. This result cannot be sustained under *Booker*'s Sixth Amendment analysis, its remedial opinion, or the law of the case doctrine.

This is so even though the sentence at issue here was imposed at a Section 3582 resentencing. There is no practical or functional difference between a resentencing pursuant to § 3582(c)(2) and any other resentencing. The principles that apply at other resentencings must apply equally to Section 3582 resentencings. No matter the context, once a court reopens a sentence and imposes a new one, that sentence must comport with existing law.

Any sentence, including a new sentence imposed under § 3582(c)(2), violates the Sixth Amendment if it exceeds the maximum allowed under the facts found by the jury or admitted by the defendant. If a district court binds itself to a previous unconstitutional Guidelines range as a baseline for a new sentence, as USSG § 1B1.10 purports to require, it reoffends the Sixth Amendment. It is immaterial that the new

sentence reduces an offender's original term of imprisonment, when the new sentence is only a reduction compared to the term the defendant originally received. It still exceeds the maximum punishment allowed based solely on facts found by the jury or admitted by the defendant by more than six years. For this reason, *Booker*'s Sixth Amendment holding requires that Mr. Dillon's sentence be vacated and the case be remanded for imposition of a constitutional sentence.

Booker's remedial opinion requires that district courts treat the Guidelines sentencing ranges, and Guidelines policy statements, as advisory. There is no basis to exempt USSG § 1B1.10 or the amended Guidelines range from the now-controlling statutory rule that the Guidelines cannot bind a sentencing court's discretion or otherwise limit its ability to comply with the statutory directive set forth in 18 U.S.C. § 3553(a): to consider the factors set forth therein and to impose a sentence sufficient, but not greater than necessary, to accomplish the goals of sentencing. Section 3582(c)(2), which incorporates this governing principle, is consistent with *Booker*'s interpretation of the Sentencing Reform Act and must be applied consistently with that law.

The district court was required to correctly calculate the Guidelines range before imposing sentence. And, post-*Booker*, the court of appeals was required to review the new sentence for procedural reasonableness, which requires reversal and remand where procedural error, including an incorrect calculation of

the criminal history score, is established. Because the court of appeals agreed that the district court lacked the authority to reconsider its prior Guidelines decisions, it allowed the criminal-history error to stand. The district court had the authority, however, to correct the error under the law-of-the-case doctrine, which permits courts to reopen previously adjudicated questions if a prior decision was clearly erroneous and would work a manifest injustice if not corrected. The criminal-history error here meets that standard.

Because the district court was required, when resentencing Mr. Dillon, to impose a sentence that conformed to the Constitution and the Sentencing Reform Act, and that was based on a correct determination of the Guidelines sentencing range, Mr. Dillon's sentence must be vacated.

ARGUMENT

I. *BOOKER*'S CONSTITUTIONAL AND REMEDIAL HOLDINGS APPLY WHEN A DISTRICT COURT IMPOSES A NEW SENTENCE UNDER SECTION 3582(c).

In *United States v. Booker*, 543 U.S. 220 (2005), this Court held that the mandatory Federal Sentencing Guidelines system violated the Sixth Amendment because it required courts to sentence defendants above the maximum authorized by the jury verdict or facts admitted by the defendant. 543 U.S. at 226-27. To remedy this constitutional infirmity, the Court excised 18 U.S.C. § 3553(b)(1) – the provision which directed courts to treat the Guidelines as mandatory. *Id.* at 258-59. For all future cases, the Court ruled, the Guidelines must be treated as advisory. *Id.* at 245. These holdings apply when a district court imposes a new sentence under § 3582.

A. *Booker* Applies to All Resentencings Where a New Sentence is Imposed in Accordance with 18 U.S.C. § 3553(a).

After *Booker* excised § 3553(b)(1), all federal sentencing under § 3553 ("Imposition of Sentence") is governed by § 3553(a)'s "overarching provision instructing judges to 'impose a sentence sufficient, but not greater than necessary,' to accomplish the goals of sentencing[.]" *Kimbrough*, 552 U.S. at 101. It is this statutory provision, not the mandatory Guidelines,

which ultimately governs the sentencing court's decision.

Nevertheless, the Commission's amended policy statement respecting § 3582 resentencings provides that "the court *shall not* reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range." USSG § 1B1.10(b)(2)(A), p.s. (2008) (emphasis added). Although the policy statement mirrors § 3553(b)(1)'s now excised command to "impose a sentence of the kind, and within the [Guidelines] range[,]" the Commission defends it, notwithstanding *Booker*, on the ground that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." USSG § 1B1.10(a)(3), p.s. (2008). This suggestion that Section 3582 resentencings are different from other ones rests on a "false . . . dichotomy." *United States v. Hicks*, 472 F.3d 1167, 1171 (9th Cir. 2007).

Even if a Section 3582(c)(2) resentencing is limited in certain respects, as many resentencings are, courts imposing a new sentence under § 3582(c)(2) must follow the same procedures under § 3553, and consider the same factors under § 3553(a), as courts imposing any other kind of new sentence. In a § 3582 resentencing, just as in any other resentencing in which a defendant's original offense level has been shown to be erroneous, the district court recalculates a new Guidelines range. In a Section 3582 resentencing, just as in any other resentencing proceeding,

the court must consider the factors set forth in 18 U.S.C. § 3553(a). § 3582(c)(2). In a Section 3582 proceeding, just as in any other resentencing proceeding, the court imposes a new sentence, based on the Guidelines and the other § 3553(a) factors, in place of the old one. And a sentence imposed pursuant to § 3582(c)(2), like a sentence imposed under § 3553(a), is reviewable under 18 U.S.C. § 3742. *See* 18 U.S.C. § 3742(a).

There is, therefore, no practical or functional difference between a Section 3582 proceeding and any other resentencing where a district court reopens a previous judgment to alter the Guidelines calculation. *See United States v. Byfield,* 391 F.3d 277, 280 (D.C. Cir. 2004) (finding "no material distinction, for these purposes, between initial sentencings and § 3582(c)(2) revisions" in response to government's suggestion that USSG § 6A1.3 may not apply in § 3582(c)(2) proceedings). Though courts conducting a Section 3582 resentencing are not permitted to revisit all prior Guidelines application decisions, the same is true in all other cases where findings of fact or conclusions of law that were not disturbed on appeal become the law of the case. *See United States v. Thomas*, 572 F.3d 945, 948-50 (D.C. Cir. 2009) (invoking law-of-the-case doctrine to foreclose challenge to determination in original sentencing that was not disturbed on appeal); *United States v. Carr*, 557 F.3d 93, 102 (2d Cir. 2009) (same).

Booker applies to all resentencings conducted in accordance with § 3553(a). For example, the courts

of appeals have consistently applied *Booker* at resentencings where the defendant was originally sentenced before *Booker* and his sentence was vacated for reasons unrelated to that decision. *See, e.g., Cirilo-Munoz v. United States*, 404 F.3d 527, 533 n.7 (1st Cir. 2005) (noting agreement among several circuits "that the advisory guidelines regime is to be used after *Booker*, even when remands for re-sentencing were not caused by a *Booker* error"); *United States v. Stewart*, 420 F.3d 1007, 1021-22 (9th Cir. 2005); *United States v. Kimbrew*, 406 F.3d 1149, 1154 (9th Cir. 2005); *United States v. Gutierrez-Ramirez*, 405 F.3d 352, 359 n.14 (5th Cir. 2005); *United States v. Doe*, 398 F.3d 1254, 1261 n.9 (10th Cir. 2005); *United States v. Gleich*, 397 F.3d 608, 615 (8th Cir. 2005); *see also United States v. Verporter*, 196 F. App'x 839, 841, 2006 WL 2641809, at *1 (11th Cir. 2006) (holding that *Booker* applies in resentencing following limited habeas relief); *United States v. Hernandez*, 450 F.Supp.2d 950, 982 (N.D. Iowa 2006) (same); *Ferrara v. United States*, 384 F.Supp.2d 384, 435 (D. Mass. 2005) (same).

Booker's application in this case becomes especially clear when § 3582(c)(2) is compared with 18 U.S.C. § 3742, which governs remands for resentencing. Like § 3742, which directs courts on remand to "resentence a defendant in accordance with § 3553," Section 3582(c)(2) requires the court to "consider the factors set forth in section 3553(a)." *Compare* 18 U.S.C. § 3742(g) *with* § 3582(c)(2). In particular, both provisions expressly require courts to

consider *all* of the Section 3553(a) factors and impose a sentence that serves section 3353(a)'s "overarching statutory directive." *Kimbrough*, 552 U.S. at 101. Furthermore, section 3582(b), the statutory provision that provides several instances in which otherwise final sentences may be modified or corrected, likewise puts resentencings under § 3582(c) and those following reversal under § 3742 on an equal footing. *See* 18 U.S.C. § 3582(b) (1)-(3). Insofar as the discretionary aspects of resentencings under § 3582(c) and § 3742 are the same, there is no principled reason to apply *Booker* at one and not the other.

Reduced to its essence, the Commission's (and Third Circuit's) position amounts to nothing more than labeling. This Court's Sixth Amendment jurisprudence teaches that when the right to a jury trial is at issue, however, "label[s]" do not control; realities do. *Apprendi v. New Jersey*, 530 U.S. 466, 476, 494 (2000). "The dispositive question" in this area of law "'is one not of form, but of effect.'" *Ring v. Arizona*, 536 U.S. 584, 602 (2002) (quoting *Apprendi*, 530 U.S. at 494); *id.* at 610 (Scalia, J. concurring) ("I believe that the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of the level of punishment that the defendant receives – whether the statute calls them elements of the offense, sentencing factors, or Mary Jane – must be found by the jury beyond a reasonable doubt."). Because the substantive operation and effect of a Section 3582 resentencing is in all relevant respects the same as any

other resentencing, *Booker* must apply in Section 3582(c)(2) proceedings as it does in any other sentencing or resentencing proceeding.

Some courts have justified the decision not to apply *Booker* in Section 3582(c) proceedings by suggesting that doing so would give defendants who were initially sentenced before *Booker*, but obtain a resentencing after *Booker* for reasons having nothing to do with that decision, a windfall. *See, e.g., United States v. Cunningham*, 554 F.3d 703, 708-09 (7th Cir. 2009) ("It would be unfair to allow a full *Booker* resentencing to only a subset of defendants whose sentences were lowered by a retroactive amendment."); *United States v. Dunphy*, 551 F.3d 247, 255 & n.6 (4th Cir. 2009). But a defendant's right to be sentenced under *Booker* simply reflects the reality that when a federal court enters a new judgment, that judgment must avoid violating current law. *See Hughey v. United States*, 495 U.S. 411, 413 n.1, 110 (1990) (agreeing with the lower court's implicit conclusion that the law in effect at the time of sentencing controls), *superseded by statute on other grounds as noted in United States v. Arnold*, 947 F.2d 1236, 1237 (5th Cir. 1991)). As the Fourth Circuit has explained:

> It could certainly be said that Butler was fortunate that the district court twice sentenced him incorrectly, thus continuing his case long enough for *Booker* to be decided before his latest sentence was imposed. But, it is not unusual for temporal happenstance

> to control whether a criminal defendant receives the benefit of a Supreme Court decision. And Butler is no less "deserving" of benefiting from *Booker* than are any of the other defendants who happened to have been sentenced after *Booker* was decided. The fact is that when Butler was sentenced, *Booker* had already been decided, and that is all that matters.

United States v. Butler, 139 F. App'x 510, 512, 2005 WL 1655028, at *2 (4th Cir. 2005) (*per curiam*). That is all that matters here as well. When the district court decided to resentence Mr. Dillon, *Booker* was the controlling law. The court was required to conduct a resentencing that was in all relevant respects identical to any other resentencing.

Indeed, the only way a Section 3582 proceeding currently differs from any other resentencing proceeding in the post-*Booker* era is that USSG § 1B1.10 purports to forbid a court in a Section 3582 proceeding from imposing a sentence that is lower than the minimum of the applicable Guidelines range, and from considering the factors set forth in § 3553(a) to the full extent that they are applicable in light of the circumstances. USSG § 1B1.10(b)(2)(A) & comment. (n.1(B)), p.s. (2008). Policy statements cannot make a Guidelines range binding on the district courts or compel a violation of the Sixth Amendment. Accordingly, *Booker* requires that those portions of USSG § 1B1.10 that purport to make the amended Guidelines range mandatory be viewed as

advisory, and that district courts have discretion to determine the appropriate sentence after considering the amended Guidelines range, the other factors set forth in § 3553(a), and any applicable policy statements, just as they would at any other sentencing or resentencing.

B. *Booker*'s Constitutional Holding Extends to a Resentencing Conducted Under 18 U.S.C. § 3582(c).

The Third Circuit did not dispute that the sentence imposed at Mr. Dillon's resentencing is six years longer than the maximum authorized by the jury's verdict. Nor did it dispute that the district court treated the Guidelines as binding. Yet the court held that Mr. Dillon's new sentence does not violate *Booker*'s constitutional holding because "*Booker* applies to full sentencing hearings – whether in an initial sentencing or in a resentencing where the original sentence has been vacated for error," but not to resentencings under § 3582(c).[12] (J.A. 52-53.) This holding misses the point: any sentence, including a

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[12] The court based its holding on the fact that both of the statutory provisions severed in *Booker* apply only in "full resentencings." (J.A. 52-53.) Because § 3553(b)(1) made the Guidelines mandatory for full sentencings and § 3742(e) directed appellate courts to apply a *de novo* standard of review to departures from the Guidelines, the Third Circuit reasoned, *Booker* must apply only to initial sentencings, appeals therefrom, and resentencings following a reversal where the original sentence is vacated for error. *Id.*

new sentence imposed under § 3582(c)(2), violates the Sixth Amendment if it exceeds the maximum allowed under the facts found by the jury or admitted by the defendant.

The Third Circuit's assertion that *Booker* does not apply at a resentencing under § 3582(c)(2), because the court "may only reduce a defendant's sentence and not increase it[,]" (J.A. 52), misapprehends a defendant's rights under the Sixth Amendment. Although a new sentence imposed under § 3582 reduces an offender's term of imprisonment *compared to the term he originally received*, the new sentence cannot survive Sixth Amendment scrutiny where, as here, the district court treated the Guidelines as binding at the original sentencing and imposed a new sentence that is still longer than would otherwise be allowed based solely on facts found by the jury or admitted by the defendant. When a court binds itself to "a defendant's previous, unconstitutional sentence as a baseline for a new sentence," it reoffends the Sixth Amendment. *See Lafayette,* 585 F.3d at 438 (recognizing that "if *Hicks* is correct, it is because a section 3582(c)(2) sentence reduction requires a new Guidelines calculation, and it is that calculation . . . that raises a *Booker* problem").[13] That is precisely what occurred here.

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[13] To the extent that the district court's decision to carry forward the unconstitutional elements of Mr. Dillon's prior sentence can be read to rely upon the law-of-the-case doctrine, the intervening decision in *Booker* would render that reliance

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Building on the basic tenets of *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803), this Court has emphasized that Congress may not confer jurisdiction on a federal court and then direct (or authorize the Commission to direct) that "it be exercised in a manner inconsistent with constitutional requirements or, what in some instances may be the same thing, without regard to them." *Yakus v. United States*, 321 U.S. 414, 468 (1944) (Rutledge, J. dissenting), *cited with approval in United States v. Sioux Nation*, 448 U.S. 371, 392 (1980). "[W]henever the judicial power is called into play, it is responsible directly to the fundamental law and no other authority can intervene to force or authorize the judicial body to disregard it." *Yakus*, 321 U.S. at 468 (Rutledge, J., dissenting); *see also Bartlett v. Bowen*, 816 F.2d 695, 707 (D.C. Cir. 1987) (Congress may not pass a law and "then avoid judicial review of a broad category of constitutional challenges by individuals injured by the law." Courts "must apply all applicable laws in rendering their decisions."). That is exactly what the Third Circuit's decision condones. Once a federal court's Article III jurisdiction has been called

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inappropriate. The law-of-the-case doctrine contains an exception for intervening changes in law. *See, e.g., Naser Jewelers, Inc. v. City of Concord*, 538 F.3d 17, 20 (1st Cir. 2008); *United States v. Tenzer*, 213 F.3d 34, 39 (2d Cir. 2000); *Hull v. Freeman*, 991 F.2d 86, 90 (3d Cir. 1993); *United States v. Monsisvais*, 946 F.2d 114, 117 (10th Cir. 1991); *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991); *Wheeler v. City of Pleasant Grove*, 746 F.2d 1437, 1441 (11th Cir. 1984).

into play, it cannot be limited in this manner without raising profound Article III and separation-of-powers concerns.

When a district court determines that a defendant is eligible for reduction in his term of imprisonment under § 3582(c)(2), any new sentence must be imposed in a manner consistent with the Constitution. By treating the amended Guidelines range as mandatory, the district court imposed a new sentence which violated the Constitution.[14] The constitutional violation can only be remedied if this Court vacates Mr. Dillon's sentence and remands for the district court to impose a sentence in accordance with *Booker*.

C. *Booker*'s Remedial Holding Extends to a Resentencing Conducted Under 18 U.S.C. § 3582(c).

The *Booker* Court found that the only "appropriate cure" for the Sixth Amendment problem with the mandatory Guidelines system "was to sever and excise the provision of the statute that rendered

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[14] By construing USSG § 1B1.10(b)(2)(A) & comment. (n.1(B)) as advisory – that is, as recommending, but not requiring, that district courts impose a new sentence no lower than the minimum of amended Guidelines range when imposing a new sentence under Section 3582 – the Court can avoid the constitutional question. *See, e.g., Northwest Austin Mun. Dist. No. One v. Holder*, 129 S. Ct. 2504, 2508, 2513 (2009) (constitutional avoidance canon).

the Guidelines mandatory, 18 U.S.C. § 3553(b)(1)," *Kimbrough*, 552 U.S. at 100-101, along with 18 U.S.C. § 3742(e), "which depends on the guidelines mandatory nature." *Booker*, 543 U.S. at 245. Under the advisory Guidelines system, "judges [are] no longer . . . tied to the sentencing range indicated in the Guidelines, but they [are] obliged to 'take account of' that range along with the other sentencing goals Congress enumerated in the SRA at 18 U.S.C. § 3553(a)." *Cunningham v. California*, 549 U.S. 270, 286-87 (2007). The Court has affirmed this revision of the SRA more than once, rejecting the argument that some guidelines remain mandatory, while the rest are advisory. *Kimbrough*, 552 U.S. at 91 ("the cocaine Guidelines, like all other Guidelines, are advisory only"); *Spears v. United States*, 129 S.Ct. 840, 842 (2009) (*per curiam*) (quoting *Kimbrough*).[15] Like "all other Guidelines," *Kimbrough*, 552 U.S. at 91, USSG § 1B1.10 must be treated as advisory under *Booker* too.

By purporting to bind courts to the Guidelines sentencing range during resentencings under § 3582(c)(2), USSG § 1B1.10 attempts to resurrect the

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[15] In *Vazquez v. United States*, No. 09-5370, the Solicitor General recently conceded that the Career Offender Guidelines are advisory, as well. *See Vazquez v. United States*, ___ S. Ct. ___, 2010 WL 154871 (Jan. 19, 2010) (granting certiorari, vacating judgment, and remanding, noting Solicitor General's agreement with petitioner that district courts may conclude in sentencing particular defendants that the career offender guideline yields a sentence greater than necessary).

mandatory Guidelines system *Booker* invalidated. In *Booker*, however, the Court made clear that a "mandatory system was no longer an open choice." *Booker*, 543 U.S. at 263. The Court expressly rejected the government's proposal to make the Guidelines advisory in some cases and binding in others. *Booker*, 543 U.S. at 265-67. "Section 1B1.10 cannot restrict a resentencing court's discretion to sentence outside of the amended guidelines range because it is, like all other guidelines, advisory under *United States v. Booker*." *United States v. Harris*, 556 F.3d 887, 889 (8th Cir. 2009) (Bye, J., concurring in the judgment) (citing *Hicks*, 472 F.3d at 1172-73).

Nevertheless, the Third Circuit found that USSG § 1B1.10 could require the district court to impose a sentence within the amended Guidelines range, because *Booker's* remedial holding did not mention § 3582(c)(2). According to the court, "[n]othing in *Booker* purports to obviate the congressional directive in § 3582(c)(2) that a sentence reduction pursuant to that section be consistent with Sentencing Commission policy statements." (J.A. 53.) That § 3582(c)(2) is not expressly addressed in *Booker* is not surprising, as it was not at issue.[16] Determining whether

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[16] "Federal courts sit 'solely to decide on the rights of individuals,'" *Hein v. Freedom From Religion Found.*, 551 U.S. 587, 598 (2007) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803)), and therefore must "'refrai[n] from passing upon the constitutionality of an act . . . unless obliged to do so in the proper performance of [their] judicial function, when the question is raised by a party whose interests entitle him to raise

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§ 3582(c)(2) could survive constitutional scrutiny was not necessary to the Court's decision in *Booker* and, consequently, no meaning can be ascribed to its absence from the Court's opinion.[17]

Even if § 3582(c)(2) had been at issue in *Booker*, this Court would not have had to sever any of it. Section 3582(c), on its face, does not compel a

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it.'" *Valley Forge Christian College v. Ams. United for Separation of Church and State*, 454 U.S. 464, 471 (1982) (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)).

[17] Courts have recognized that other statutory provisions not specifically mentioned or excised in *Booker*, but which render the Guidelines mandatory or "which depend [ ] upon the guidelines' mandatory nature," cannot stand side-by-side with *Booker*. *See, e.g., United States v. Allen*, 450 F.3d 565, 570 n.5 (4th Cir. 2006) (stating that notwithstanding mandatory language, and *Booker's* focus on 18 U.S.C. § 3553(a), not subsection (e), this Court, post-*Booker*, has recognized that a court under § 3553(e) may give full consideration to the § 3553(a) factors and is not bound by the guidelines in imposing a sentence below the mandatory minimum); *United States v. Selioutsky*, 409 F.3d 114, 117 (2d Cir. 2005) (*Booker* rationale requires us to consider subsection 3553(b)(2) to be excised); *United States v. Bolanos*, 409 F.3d 1045, 1047 (8th Cir. 2005) (if safety valve provision of 18 U.S.C. § 3553(f) applied, defendant would be sentenced under the Guidelines as qualified by *Booker*); *United States v. Yazzie*, 407 F.3d 1139, 1145 (10th Cir. 2005) (applying *Booker's* reasoning to excise § 3553(b)(2)); *States v. Sharpley*, 399 F.3d 123, 127 n.3 (2d Cir. 2005) (concluding *Booker's* failure to excise 18 U.S.C. § 3553(b)(2) from the SRA "was simply an oversight"); *United States v. Duran*, 383 F.Supp.2d 1345, 1349 (D. Utah 2005) (Cassell, J.) (finding "unpersuasive" the argument that "the Guidelines nonetheless remain mandatory when the court proceeds under the safety valve"; the "pursuant to" language does not transform advisory guidelines into mandatory guidelines).

constitutional violation.[18] It does so only when combined with a mandatory reading of USSG § 1B1.10's post-*Booker* directive to treat the Guidelines range as binding. It is USSG § 1B1.10 – and not § 3582 – that renders the Guidelines mandatory and seeks to override this Court's interpretation of the SRA. Section 1B1.10 expressly limits consideration of the factors in § 3553(a) to a determination of where – within the recalculated

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[18] Once the Commission exercises its power under 28 U.S.C. § 994(o) to amend a Guideline, and its power under 28 U.S.C. § 994(u) to make the amendment retroactive, § 3582(c)(2) commits the decision whether to grant a reduction and impose a new sentence to the sound discretion of the district court. By directing the court to act "consistent with applicable policy statements issued by the Sentencing Commission," § 3582(c)(2) does not impose a mandatory limit on a judge's discretion to reduce a defendant's term of imprisonment.

Section 994(a)(2)(C) directs the Commission to issue general policy statements regarding the appropriate use of 13 sentencing-related provisions, including § 3582(c). 28 U.S.C. § 994(a)(2)(C). None of the policy statements promulgated with respect to the provisions enumerated in § 994(a)(2)(c), except USSG § 1B1.10, as revised post-*Booker*, purports to independently bind the court to a Guidelines range (or a particular sentence) where the related statutory provision does not. *See* USSG §§ 1B1.13, p.s., 5B1.3(c)-(e), p.s., 5D1.2(b), p.s., 5D1.3(c)-(e), p.s., 6B1.1, p.s., 6B1.2, p.s., 6B1.3, p.s., 6B1.4, p.s. In any event, this Court's post-*Booker* decisions establish that the mandate in USSG § 1B1.10 that courts impose within-Guideline sentences cannot properly be treated as binding. *See Rita v. United States*, 551 U.S. 338, 351 (2007) (authorizing variances where Guidelines policy statements do not treat offender characteristics in the proper way); *Gall v. United States*, 552 U.S. 38 (2007) (same).

Guidelines range – to set the sentence a defendant, thereby preventing the district court from fashioning a sentence that complies with its statutory directive to "impose a sentence sufficient, but not greater than necessary to accomplish the goals of sentencing." *Kimbrough*, 552 U.S. at 101.

Section 1B1.10 cannot be interpreted to limit the sentencing court's authority to comply with § 3553(a). As this Court has made clear, directions in the Guidelines are invalid if inconsistent with federal statutory law. *Stinson v. United States*, 508 U.S. 36, 38 (1993) (Guidelines commentary is authoritative unless it violates the Constitution or a federal statute). When interpreted as a mandatory limit on a district court's discretion to impose a sentence under the SRA, USSG § 1B1.10 is not consistent with federal statutory law, as it conflicts with *Booker's* constitutionally required interpretation of the SRA. Where the policy statement and the statute (as interpreted and modified by *Booker*) conflict, the policy statement must give way. *Hicks*, 472 F.3d at 1173; *see also Stinson*, 508 U.S. at 38 (explaining that the Guidelines commentary "is authoritative unless it violates the Constitution or a federal statute"); *Neal v. United States*, 516 U.S. 284, 293 (1996) (noting that the Commission does not have authority to give a statute pertaining to criminal penalties a different interpretation than given it by this Court).

A ruling that *Booker's* remedial holding extends to a Section 3582 resentencing – and renders USSG § 1B1.10 advisory – would be consistent with the

post-*Booker* amendment to Federal Rule of Criminal Procedure 35(b), which conformed Rule 35(b)(1) to this Court's decision in *Booker*. Before the amendment, a district court could not reduce a defendant's sentence unless "reducing the sentence accords with the Sentencing Commission's guidelines and policy statements." Fed. R. Crim. P. 35(b)(1)(B) (2006). The rule now reads: "Upon the government's motion made within one year of sentencing, the court may reduce a sentence if the defendant, after sentencing, provided substantial assistance in investigating or prosecuting another person." Fed. R. Crim. P. 35(b)(1) (2007).

Subsection (b)(1)(B) was deleted "because it treat[ed] the guidelines as mandatory." Fed. R. Crim. P. 35 advisory committee's note (2007). The committee that reviewed Rule 35 concluded that "strong arguments existed for amending" Rule 35 because the requirement that any reduction in sentence be in accordance with the Guidelines "assume[s] that the sentencing guidelines are mandatory – a principle rejected by the Supreme Court in *Booker*." Minutes of the Advisory Committee on Federal Rules of Criminal Procedure, April 4-5, 2005.[19]

The Commission requested that the Committee "preserve [] the existing rule's explicit reference to the Sentencing Guidelines and questioned whether the *Booker* remedial opinion applied to post-sentencing

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[19] The minutes are available at http://www.uscourts.gov/rules/Minutes/CR04-2005-min.pdf.

proceedings." Minutes of the Advisory Committee on Federal Rules of Criminal Procedure, April 3-4, 2006.[20] The Rules Advisory Committee was not persuaded. Although the Commission was unsuccessful in convincing the Rules Advisory Committee that *Booker*'s remedial holding did not apply in Rule 35(b) resentencings, it amended USSG § 1B1.10, in the district court's words, "specifically to prevent the application of *Booker* to Section 3582(c)(2) proceedings" and to "make it clear that *Booker* variances are not consistent with the Sentencing Commission policy statements." (J.A. 40, 41.) The Court should reject any effort to limit *Booker's* application in cases sentenced under the Guidelines and confirm that *Booker*'s remedial holding applies to all sentences imposed under the SRA, including those imposed pursuant to § 3582(c).

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[20] The minutes are available at http://www.uscourts.gov/rules/Minutes/CR04-2006-min.pdf. Notably, the Department of Justice offered no comment to the Committee's proposal to amend Rule 35(b) to conform with *Booker*. Indeed, after extensive notice and comment procedures, the Commission voiced the only opposition to the Committee's proposal. *See generally* Criminal Rules Committee Chart, available at http://www.uscourts.gov/rules/CR%20%Rules%202005.htm.

II. THE DISTRICT COURT HAD AUTHORITY TO CALCULATE CORRECTLY THE AMENDED GUIDELINES RANGE AT MR. DILLON'S SECTION 3582(c) RESENTENCING.

The district court originally sentenced Mr. Dillon based on a clearly erroneous criminal history category that resulted in an incorrect Guidelines range and a sentence two years longer than it should have been. At the Section 3582(c)(2) resentencing, the district court concluded it could not address its prior determination and, consequently, left the error uncorrected. The court was wrong: precedent and statute make clear that all sentencing proceedings, including resentencings, must begin with the correctly calculated Guidelines range. The district court therefore had both the duty and the authority to correct the error. Its failure to do so requires that Mr. Dillon's sentence be vacated. Regardless of this Court's ruling on the first Question Presented, therefore, this case should be remanded for a resentencing with instructions that the district court begin with a correct Guidelines range calculation.

A. The Sentence Imposed By the District Court Was Based on an Incorrect Guidelines Calculation.

The criminal history calculation improperly included a one-point assessment for a misdemeanor resisting arrest conviction for which Mr. Dillon received a suspended probationary sentence. The error changed Mr. Dillon's Criminal History Category from Category I to Category II, and increased the amended Guidelines range (and consequently his sentence) by nearly two years.

According to the Presentence Report, Mr. Dillon pled guilty in 1990 to misdemeanor resisting arrest, and a California court imposed a suspended sentence of two years probation, with credit for two days time served. (J.A. 74 at ¶47.) The presentence report also indicates that Mr. Dillon "was placed in a 6-month diversion program[, which h]e successfully completed . . . on December 20, 1990." (J.A. 27, 75 at ¶47.) Relying on the Report, the district court found Mr. Dillon's prior California misdemeanor resisting arrest conviction counted toward his criminal history score. Based on that finding, the court assigned the conviction one criminal history point under USSG § 4A1.1(c) and USSG § 4A1.2(c)(1). (J.A. 74 at ¶47.)

This calculation was erroneous: because the only term of imprisonment imposed was two days and the probationary portion of Mr. Dillon's sentence was suspended, the prior conviction could not be counted for purposes of calculating his criminal history score.

Under USSG § 4A1.2(c)(1), sentences for listed misdemeanors, including resisting arrest, are counted only if "(A) the sentence was a *term of probation of at least one year or a term of imprisonment of at least thirty days.*" USSG § 4A1.2(c)(1)(A) (emphasis added). The term of imprisonment here was two days' time served, fewer than 30 days, so Mr. Dillon's misdemeanor resisting arrest conviction could only count toward his criminal history score if the sentence included a term of probation of at least one year that was *actually* imposed and not suspended. *United States v. Mejia*, 559 F.3d 1113, 1116 (9th Cir. 2009) (holding "[j]ust as 'a term of imprisonment' means 'a term of actual confinement' . . . , a term of probation means a term of *actual* probation[,]" and finding plain error where court assigned one criminal history point for a California misdemeanor resisting arrest conviction when the sentence imposed was a suspended sentence of two years probation) (emphasis added). Because the court suspended Mr. Dillon's two-year sentence of probation, the sentence is not counted under U.S.S.G. § 4A1.2(c)(1)(A). In assessing the one criminal history point for the resisting arrest conviction, however, the district court never addressed whether and how the imposition of the *suspended* sentence affected the calculation of criminal history score in this case.

Nine years after the sentence was imposed, Mr. Dillon obtained an order from a California state court allowing him to withdraw his guilty plea to resisting arrest, dismissing the accusatory pleading, and

releasing him "'from all penalties and disabilities resulting from the conviction pursuant to Penal Code Section 1203.4.'" (J.A. 28.) Mr. Dillon then filed a *pro se* motion asking the district court to correct his criminal history score and to resentence him. (Docket Entries 141, 145.) The district court denied his request, concluding that "the setting aside of a conviction under California Penal Code Section 1203.4 has no effect on the calculation of his sentence. . . . [and USSG § 4A1.2, comment. (n.10)] mandate[s] that convictions set aside under state law be counted in computing criminal history." (J.A. 28.)

Even if the district court were correct that convictions set aside under the California statute are counted under USSG § 4A1.2's commentary, a point that Mr. Dillon does not concede, its analysis of Mr. Dillon's *pro se* arguments again failed to appreciate the overriding significance of the suspended nature of the sentence. A sentence for resisting arrest – whether or not it was imposed on a conviction that is later set aside or vacated – does not count under USSG § 4A1.2(c)(1) unless it is an actual (not suspended) term of probation of at least one year.

The district court erred at Mr. Dillon's original sentencing, in its 1999 order, and again at the Section 3582(c) resentencing when it determined the Guidelines range based on an incorrectly calculated

criminal history category. Finding it was not permitted under USSG § 1B1.10 or § 3582(c) to revisit the criminal history issue at resentencing, the district court adopted its prior error. As a result of the error, the court added one criminal history point to Mr. Dillon's criminal history score. Together with the one point properly assessed for a 1989 misdemeanor marijuana possession conviction, the erroneously assessed point increased Mr. Dillon's Criminal History Category from I to II. Using this erroneous criminal history category, the court determined the amended Guidelines range to be 270 to 322 months. The 270-month sentence imposed is nearly two years longer than a sentence at the bottom end of the correctly calculated range (248 to 295 months).

B. The District Court Had the Duty to Correctly Calculate the Amended Guidelines Range.

As this Court repeatedly has explained, "'a district court should begin all sentencing proceedings by correctly calculating the Guidelines range.'" *Gall v. United States,* 552 U.S. 38, 49-50 (2007) (citing *Rita*, 551 U.S. at 351); *see also Booker,* 543 U.S. at 261-62. The failure to correctly calculate the Guidelines range constitutes reversible error. *Gall,* 552 U.S. at 49-50. The duty to correctly calculate the Guidelines range applies with equal force at a Section 3582(c) resentencing. *United States v. Hall*, 582 F.3d 816, 818-19 (7th Cir. 2009) (remanding to district court to correctly calculate offense level in

Section 3582(c)(2) proceeding where there was ambiguity about the drug quantity established by defendant's guilty plea admissions); *United States v. Jennings*, 2009 WL 2917709, at *2 (11th Cir. 2009) (unpublished) (finding district court committed procedural error at § 3582(c) resentencing by incorrectly calculating the Guidelines range and failing to consider § 3553(a) factors but declining to remand because error benefited defendant).

Section 3742, which provides that a defendant may appeal "an otherwise final sentence if the sentence was imposed as a result of an incorrect application of the sentencing guidelines," 18 U.S.C. § 3742(a)(2), is one source of this duty. Where, as here, the sentence was imposed as a result of an incorrect application of the Guidelines, Section 3742(f) requires reversal. 18 U.S.C. § 3742(f)(1) ("If the court of appeals determines that – (1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate. . . .").

The court's duty to correctly calculate the Guidelines range also flows from the appellate standard of review for sentences. On review, a sentence imposed under § 3582(c), like all others, is reviewed for reasonableness. *United States v. Lafayette*, 585 F.3d 435, 439 (D.C. Cir. 2009) (reasonableness review applies to sentences imposed under § 3582(c)(2); *United States v. Styer*, 573 F.3d 151 (3d Cir. 2009) (reviewing

§ 3582(c)(2) sentence for reasonableness). *But see United States v. Evans*, 587 F.3d 667 (5th Cir. 2009) (reasonableness standard does not apply to review of Section 3582(c)(2) sentence). When reviewing a sentence for reasonableness, of course, appellate courts "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range."[21] *Gall,* 552 U.S. at 49-50. If procedural error is found, reversal and remand are required. *Id.*

Because Mr. Dillon's new sentence is reviewed for reasonableness and because procedural correctness is a necessary part of such review, it was error to leave the Guidelines error uncorrected.

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[21] This is true whether the sentence was imposed at an initial sentencing, resentencing on remand, or following a revocation of supervised release. *See, e.g., United States v. Bungar*, 478 F.3d 540, 542 (3d Cir. 2007) ("The dust has settled, post-*Booker*, and it is now well understood that an appellate court reviews a sentence for reasonableness. . . . We see no reason why that [reasonableness] standard should not also apply to a sentence imposed upon a revocation of supervised release, and we so hold."), *joining United States v. Sweeting*, 437 F.3d 1105, 1106-07 (11th Cir. 2006); *United States v. Tyson*, 413 F.3d 824, 825 (8th Cir. 2005); *United States v. Fleming*, 397 F.3d 95, 99 (2d Cir. 2005).

C. The District Court Had the Authority to Correctly Calculate the Amended Guidelines Range.

It is undisputed that the Commission's decision to make the amendment to the crack cocaine Guidelines retroactive triggered the court's authority to resentence in Mr. Dillon's case. Even the Commission acknowledges that this required the court to recalculate his Guidelines range. USSG § 1B1.10(b)(1) & comment. (n.2). And, it should be beyond dispute that every sentencing that requires a calculation of the Guidelines should begin with correct calculation. *See Gall,* 552 U.S. at 49-50 (citing *Rita,* 551 U.S. at 351).

Once the court's authority to resentence is triggered, the new sentence under § 3582(c)(2), like any other sentence, must be imposed in accordance with factors set forth in § 3553(a). 18 U.S.C. § 3582(c)(2) ("the court may reduce the term of imprisonment after considering the factors set forth in § 3553(a)"). Nevertheless, when calculating the amended Guidelines range at Mr. Dillon's Section 3582(c) resentencing, the district court relied on USSG § 1B1.10's instruction to "substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and [] *leave all other guideline application decisions unaffected*," USSG § 1B1.10(b)(1) (emphasis added), and concluded it lacked the authority to consider whether its original

calculation of Mr. Dillon's criminal history category was correct. (J.A. 41-42.)

The above-quoted language from USSG § 1B1.10 does not "prohibit" the district court from reconsidering prior decisions. *See United States v. Adams,* 104 F.3d 1028, 1030 (11th Cir. 1997).[22] To the extent the district court was bound by its previous decisions, *see id.*, it was bound only by jurisprudential principles embodied in the law-of-the-case doctrine, which typically prohibits a court from reopening an issue decided in an earlier stage of the same litigation. *Agostini v. Felton,* 521 U.S. 203, 236 (1997); *Christianson v. Colt Industries Operating Corp.,* 486

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[22] The Eleventh Circuit interpreted the instruction in USSG § 1B1.10 that "all other guideline application decisions remain unaffected" to mean that "all other applicable guidelines remain unaffected by the amendments." The court stated: "the reference is to decisions with respect to what other guidelines are applicable and to their meaning, not to prior factual findings." *United States v. Adams,* 104 F.3d 1028, 1030 (11th Cir. 1997).

The court's interpretation is supported by the history of USSG § 1B1.10. When USSG § 1B1.10 was amended in 1994 to include the above language, the reason for the amendment was "to substantially simplify its operation" and ensure that the amended Guidelines range was determined "using only those amendments expressly designated as retroactive." 59 Fed. Reg. 23,608, 23,609 (May 5, 1994). Prior to 1994, the amended Guidelines range was "determined by applying all amendments to the Guidelines (i.e., as if the defendant was being sentenced under the Guidelines currently in effect)," USSG § 1B1.10, p.s. (1989), which had the effect of making all Guidelines amendments retroactive for defendants resentenced under § 3582(c).

U.S. 800, 817 (1988) (citation omitted) ("law-of-the-case doctrine 'merely expresses the practice of the courts generally to refuse to reopen what has been decided, not a limit to their power.'"). A court may, however, revisit an issue when it is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." *Arizona v. California,* 460 U.S. 605, 618 n.8 (1983). *See Dobbs v. Zant,* 506 U.S. 357, 358-59 (1993) (*per curiam*) (summarily reversing denial of habeas corpus relief where lower court erroneously failed to apply manifest injustice exception to "law of the case" doctrine).

At Mr. Dillon's original sentencing and at his Section 3582(c) resentencing, the district court selected a sentence at the bottom of the Guidelines range. Had the court corrected the error and, as before, sentenced Mr. Dillon to the low end of the Guidelines range, it would have further reduced Mr. Dillon's sentence by nearly two years. The failure to correct the error constitutes a manifest injustice, especially when considered in light of the fact that Mr. Dillon's sentence already exceeds by more than six years the maximum sentence authorized by the jury's verdict. *See United States v. Glover,* 531 U.S. 198, 203 (2001) ("our jurisprudence suggests that any amount of actual jail time has Sixth Amendment significance").

Because the district court based its amended Guidelines range calculation, in part, on a clearly erroneous prior decision, and because the error, left uncorrected, works a manifest injustice, the district

court had the duty and authority to correct the error as an exception to the law-of-the-case doctrine. Nothing contained in USSG § 1B1.10 is to the contrary.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision of the Third Circuit, vacate the sentence, and remand to the district court for resentencing.

Respectfully submitted,

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STATUTORY ADDENDUM

18 U.S.C. § 3553(a), provides in part:

> **Factors to be considered in imposing a sentence.** – The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider –
>
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed –
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;
>
> (C) to protect the public from further crimes of the defendant; and
>
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
>
> (3) the kinds of sentences available;
>
> (4) the kinds of sentence and the sentencing range established for –

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines –

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, . . .

(5) any pertinent policy statement – (A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, . . .

(6) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

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18 U.S.C. § 3582, provides in part:

(b) **Effect of finality of judgment**. – Notwithstanding the fact that a sentence to imprisonment can subsequently be –

(1) modified pursuant to the provisions of subsection (c);

(2) corrected pursuant to the provisions of rule 35 of the Federal Rules of Criminal Procedure and section 3742; or

(3) appealed and modified, if outside the guideline range, pursuant to the provisions of section 3742;

a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes.

> (c) **Modification of an imposed term of imprisonment.** – The court may not modify a term of imprisonment once it has been imposed except that – . . .
>
> > (2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant . . . , the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such reduction is consistent with applicable policy statements issued by the Sentencing Commission. . . .

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18 U.S.C. 3742(g) provides:

> (g) Sentencing upon remand. – A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that –
>
> (1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date

of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that –

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

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28 U.S.C. § 994(a) provides in part:

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System – . . .

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of – . . .

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18. . . .

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28 U.S.C. § 994(o) provides in part:

(o) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section.

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28 U.S.C. § 994(u) provides in part:

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

USSG § 1B1.10. REDUCTION IN TERM OF IMPRISONMENT AS A RESULT OF AMENDED GUIDELINE RANGE (POLICY STATEMENT) (2008) (after Amendment 712)

(a) *Authority.* –

(1) *In General.* – In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by ~~18 U.S.C.~~ § 3582(c)(2). As required by 18 U.S.C. § 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) *Exclusions.* – A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. § 3582(c)(2) if –

(A) none of the amendments listed in subsection (c) is applicable to the defendant; or

(B) an amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) *Limitation.* – Consistent with subsection (b), proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) *Determination of Reduction in Term of Imprisonment.* –

(1) *In General.* – In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) *Limitations and Prohibition on Extent of Reduction.* –

(A) *In General.* – Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) *Exception.* – If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection

may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) *Prohibition.* – In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) *Covered Amendments.* – Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715.

Commentary

Application Notes:

1. ***Application of Subsection (a).*** –

(A) ***Eligibility.*** – *Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. § 3582(c)(2) and is not consistent with this policy statement if: (i) none of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the*

defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) ***Factors for Consideration.*** *–*

(i) ***In General.*** *– Consistent with 18 U.S.C. § 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. § 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).*

(ii) ***Public Safety Consideration.*** *– The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).*

(iii) ***Post-Sentencing Conduct.*** *– The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).*

*2. **Application of Subsection (b)(1).** – In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*

*3. **Application of Subsection (b)(2).** – Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.*

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the

time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) the guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. ***Supervised Release.*** *–*

(A) ***Exclusion Relating to Revocation.*** *– Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.*

*(B) **Modification Relating to Early Termination**. – If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).*

***Background**: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section*

3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component

of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

USSG § 1B1.10. REDUCTION IN TERM OF IMPRISONMENT AS A RESULT OF AMENDED GUIDELINE RANGE (POLICY STATEMENT) (Before Amendment 712)

(a) Where a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual

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* *So* in original. Probably should be "to fall above the amended guidelines".

listed in subsection (c) below, a reduction in the defendant's term of imprisonment is authorized under 18 U.S.C. § 3582(c)(2). If none of the amendments listed in subsection (c) is applicable, a reduction in the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) is not consistent with this policy statement and thus is not authorized.

(b) In determining whether, and to what extent, a reduction in the term of imprisonment is warranted for a defendant eligible for consideration under 18 U.S.C. § 3582(c)(2), the court should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was sentenced, except that in no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, and 702.

Commentary

Application Notes:

1. Eligibility for consideration under 18 U.S.C. § 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range.

2. In determining the amended guideline range under subsection (b), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.

3. Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2). When the original sentence represented a downward departure, a comparable reduction below the amended guideline range may be appropriate; however, in no case shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not authorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

5. If the limitation in subsection (b) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range, the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a

term of supervised release under 18 U.S.C. § 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range.

***Background**: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."*

This policy statement provides guidance for a court when considering a motion under 18 U.S.C. § 3582(c)(2) and implements 28 U.S.C. § 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount

the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. § 994(u) (formerly § 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated

instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

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* *So* in original. Probably should be "to fall above the amended guidelines".

RESPONDENT'S BRIEF

(5) 13217

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No. 09-6338

In the Supreme Court of the United States

PERCY DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

Under 28 U.S.C. 994(u), if the Sentencing Commission reduces the recommended term of imprisonment for a category of defendants, "it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." Under 18 U.S.C. 3582(c)(2), a district court has discretion to reduce a defendant's term of imprisonment based on an amendment to the Sentencing Guidelines that the Sentencing Commission has made retroactive, "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." The applicable policy statement, Sentencing Guidelines § 1B1.10, sets forth the Guidelines amendments that permit sentence reduction and further provides that the reduction in any individual case should not exceed the extent of the reduction called for by the relevant change to the Guidelines. The questions presented are:

1. Whether, in a sentence-reduction proceeding under 18 U.S.C. 3582(c)(2), the district court has authority to reduce a sentence of imprisonment in a manner inconsistent with the Commission's policy statement by relying on *United States* v. *Booker*, 543 U.S. 220 (2005).

2. Whether petitioner's sentence rested on an incorrectly calculated Sentencing Guidelines range, and if so, whether the district court in petitioner's Section 3582(c)(2) sentence-reduction proceeding had the authority to revisit Guidelines determinations that were unaffected by the retroactive change in the lowered Guidelines range.

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In the Supreme Court of the United States

No. 09-6338

PERCY DILLON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 47-55) is reported at 572 F.3d 146.

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2009. The petition for a writ of certiorari was filed on September 1, 2009, and was granted on December 7, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions are reprinted in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Pennsylvania, petitioner was convicted in 1993 of conspiracy to distribute and possess with the intent to distribute more than 500 grams of cocaine and more than 50 grams of cocaine base (*i.e.*, crack cocaine), in violation of 21 U.S.C. 846; use of a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1); and possession with intent to distribute more than 500 grams of cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to terms of imprisonment of 262 months on the narcotics counts and 60 consecutive months on the firearms count. The court of appeals affirmed.

In 2007, the United States Sentencing Commission amended the Sentencing Guidelines to lower the base offense level for drug-trafficking offenses involving crack cocaine. The Commission subsequently made the amendments retroactively applicable to defendants serving sentences of imprisonment and specified "in what circumstances and by what amount" sentences could be reduced. 28 U.S.C. 994(u). Petitioner filed a motion for a sentence reduction under 18 U.S.C. 3582(c)(2) based on those amendments. Consistent with the Commission's applicable policy statement, the district court reduced petitioner's term of imprisonment on the narcotics convictions to 210 months based on the Commission's crack cocaine amendments, but rejected petitioner's request for a further sentence reduc-

tion pursuant to *United States* v. *Booker*, 543 U.S. 220 (2005), as beyond its authority under Section 3582(c)(2). J.A. 32-43. The court of appeals affirmed. J.A. 47-55.

A. Background

1. In the Sentencing Reform Act of 1984 (SRA), 18 U.S.C. 3551 *et seq.*, 28 U.S.C. 991 *et seq.*, Congress created the United States Sentencing Commission and charged it with promulgating sentencing guidelines and policy statements "regarding application of the guidelines or any other aspect of sentencing or sentence implementation," 28 U.S.C. 994(a)(1) and (2). Congress also charged the Commission with periodically reviewing and revising the Sentencing Guidelines. 28 U.S.C. 994(*o*). When the Commission's revisions result in a reduced sentencing range, Congress granted the Commission the authority to specify "in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. 994(u). The SRA thus gives the Commission "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton* v. *United States*, 500 U.S. 344, 348 (1991) (emphasis omitted). The Commission has implemented those responsibilities in Sentencing Guidelines § 1B1.10, a policy statement governing reduction of terms of imprisonment based on amended Guidelines ranges. See *Braxton*, 500 U.S. at 348; see also 28 U.S.C. 994(a)(2)(C) (authorizing policy statements "regarding * * * the sentence modification provisions set forth in section[] 3582(c)").

Although the SRA generally forbids a court from "modify[ing] a term of imprisonment once it has been imposed," 18 U.S.C. 3582(c), it provides an exception to the rule "in the case of a defendant who has been sentenced to

a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*)," 18 U.S.C. 3582(c)(2). In such a case, a court may reduce the defendant's term of imprisonment after considering the statutory sentencing factors set out in 18 U.S.C. 3553(a), but only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.*

2. This case concerns the Sentencing Commission's 2007 amendments reducing the Guidelines sentencing ranges for offenses involving crack cocaine.

a. The Sentencing Guidelines employ a drug quantity table that sets the base offense levels for drug offenses according to the drug type and weight. See Guidelines § 2D1.1. When the Sentencing Commission first promulgated the Guidelines in 1987, it set the base offense levels for each type of drug in relation to the mandatory minimum sentences for offenses involving the same type of drug set out in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986 Act). See United States Sentencing Commission, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 126 (1995), http://www.ussc.gov/crack/exec.htm (1995 Commission Report). Based on Congress's concerns about the heightened dangers of offenses involving crack cocaine, the 1986 Act had "adopted a '100-to-1 ratio' that treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough* v. *United States*, 552 U.S. 85, 96 (2007). By setting base offense levels under the Guidelines to correlate with the basis of mandatory minimum sentences set out in the 1986 Act, the Guidelines effectively adopted the same 100-to-1 ratio. *Id.* at 96-97.

b. The Commission later reexamined the crack/powder sentencing disparity. See *Kimbrough*, 552 U.S. at 97-99.

After Congress rejected its initial effort in 1995 to amend the Guidelines to reduce the 100-to-1 ratio, the Commission several times issued reports urging Congress to take action to address the disparity. See *id.* at 99-100. In May 2007, the Commission issued another such report. United States Sentencing Commission, *Report to the Congress: Cocaine and Federal Sentencing Policy*, http://www.ussc.gov/rcongress/cocaine2007.pdf. At the same time, the Commission amended the Guidelines to ameliorate the crack/powder disparity without awaiting congressional action. See *id.* at 9; 72 Fed. Reg. 28,571-28,572 (2007); see also *Kimbrough*, 552 U.S. at 100. The 2007 crack cocaine amendments reduce the base offense level associated with each quantity of crack cocaine by two levels. See Guidelines App. C, Amend. 706 (Supp. 2008), amended by Guidelines App. C, Amends. 711 and 715 (Supp. 2008). In promulgating the crack cocaine amendments, the Commission described them "only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio," noting that "[a]ny comprehensive solution to the 100-to-1 drug quantity ratio requires appropriate legislative action by Congress." 72 Fed. Reg. at 28,573.

c. The Sentencing Commission thereafter considered whether to apply the crack cocaine amendments retroactively to defendants serving sentences of imprisonment. See 72 Fed. Reg. 41,794 (2007) (request for public comment). In December 2007, after receiving comments and holding a public hearing, the Commission voted to amend Guidelines § 1B1.10 to make the crack cocaine amendment retroactive. 73 Fed. Reg. 217 (2008); see Guidelines App. C, Amend. 713 (Supp. 2008).

At the same time, the Sentencing Commission amended Guidelines § 1B1.10 to "clarify when, and to what extent, a reduction in the defendant's term of imprisonment is con-

sistent with the policy statement and is therefore authorized under 18 U.S.C. 3582(c)(2)." 73 Fed. Reg. at 219; see Guidelines App. C, Amend. 712 (Supp. 2008). As amended, Guidelines § 1B1.10 states that "proceedings under 18 U.S.C. § 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant." Guidelines § 1B1.10(a)(3). It provides that a court evaluating a motion for sentence reduction under Section 3582(c)(2) should determine "whether, and to what extent, a reduction" is warranted by substituting the amended Guideline for the Guideline in effect at the time the defendant was sentenced, leaving "all other guideline application decisions unaffected." Guidelines § 1B1.10(b)(1). The policy statement further provides that the court may not reduce a defendant's within-Guidelines sentence "to a term that is less than the minimum of the amended guideline range." Guidelines § 1B1.10(b)(2)(A); cf. Guidelines § 1B1.10(b)(2)(B) (providing that a below-Guidelines sentence may warrant a "reduction comparably less than the amended guideline range").

d. Since the Commission voted to make the crack cocaine amendments retroactive, more than 23,000 defendants have sought sentence reductions based on the amendments, and more than 15,000 such reductions have been granted. See United States Sentencing Commission, *Preliminary Crack Cocaine Retroactivity Data Report* Tbl. 1 (2010), http://www.ussc.gov/USSC_Crack_Retroactivity_Report_2010_January.pdf (2010 Data Report). The sentences of successful defendants have been decreased by an average of 25 months. *Id.* Tbl. 8.

B. Facts And Proceedings Below

1. In August 1992, petitioner entered a conspiracy to distribute crack and powder cocaine. The cocaine was either flown or mailed from California, often in quantities of one kilogram or more, for distribution in Pittsburgh. A portion of the proceeds was then mailed to the California suppliers. Petitioner's role in the conspiracy was to assist in directing the transportation of the cocaine into Pittsburgh, cooking it into crack, and distributing it. Gov't C.A Br. 7; Presentence Report ¶¶ 9-20 (PSR).[1]

In March 1993, postal inspectors intercepted a suspicious package bound for Pennsylvania, determined through the use of a drug detecting dog that the package contained narcotics, and arranged a controlled delivery to an address in Monroeville, Pennsylvania. Petitioner and two of his co-conspirators arrived at that address in a rented white Dodge Dynasty, retrieved the package, and drove off toward the apartment petitioner had rented for the purpose of cooking cocaine into crack. The police lost the Dodge Dynasty during a high-speed chase that caused two motorists to crash into each other. Three days later, the authorities apprehended petitioner and his two co-conspirators in McKeesport, Pennsylvania. Gov't C.A. Br. 7-9; PSR ¶¶ 21-27.

2. A grand jury in the Western District of Pennsylvania returned a superseding indictment charging petitioner with conspiracy to distribute and to possess with the intent to distribute in excess of 500 grams of cocaine and more than 50 grams of cocaine base (*i.e.*, crack cocaine), in violation of 21 U.S.C. 846; possession of more than 500 grams of cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1);

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[1] The PSR is reprinted in Volume II of the Joint Appendix, which has been filed in this Court under seal.

and using a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(c)(1). Gov't C.A. Br. 9. Following a jury trial, petitioner was convicted of all of the charges against him. J.A. 49. Petitioner's convictions exposed him to a statutory sentencing range of ten years to life on the crack-cocaine conspiracy count, see 21 U.S.C. 841(b)(1)(A)(iii); five years on the cocaine possession count, see 21 U.S.C. 841(b)(1)(B)(ii); and a mandatory consecutive sentence of five years on the firearm count, see 18 U.S.C. 924(c)(1)(A)(I).

3. At petitioner's sentencing in November 1993, the district court found that petitioner was responsible for 1.5 kilograms of cocaine base and 1600 grams of cocaine powder, which resulted in a base offense level of 38 under Sentencing Guidelines § 2D1.1. C.A. App. 83 & n.2, 89 (tentative findings); J.A. 10 (adopting tentative findings). After adjustments for reckless endangerment during flight under Guidelines § 3C1.2, and acceptance of responsibility under Guidelines § 3E1.1, petitioner's total offense level remained 38. See C.A. App. 89; J.A. 7, 10.

In its PSR, the Probation Office had found that petitioner's criminal history score placed him in criminal history category II. The PSR relied on two prior misdemeanor convictions: a 1989 Louisiana conviction for possession of marijuana and a 1990 California misdemeanor conviction for resisting arrest. PSR ¶¶ 46-48. The PSR recited that, as to the 1990 resisting arrest conviction, imposition of sentence was suspended, and petitioner was sentenced to two years of probation and credit for two days served. The PSR also recited that petitioner had been charged with possession of crack cocaine and successfully completed a six-month diversion program in 1990. PSR ¶ 47. Petitioner did not contest the PSR's calculation of his criminal history

score, and the district court adopted the PSR's calculation at sentencing. C.A. App. 90.

With a total offense level of 38 and a criminal history category II, petitioner's Guidelines range for the narcotics offenses was 262 to 327 months of imprisonment. J.A. 12. The court sentenced petitioner to 262 months of imprisonment on the narcotics counts, to be followed by the mandatory 60-month consecutive sentence on the firearms count, for a total sentence of 322 months of imprisonment. J.A. 11. The court stated that it "personally [did not] believe that [petitioner] should be serving 322 months," but that it was "bound by th[e] Guidelines." J.A. 12-13; accord J.A. 22.

4. Petitioner appealed, again raising no objection to the calculation of his criminal history category. In 1996, the court of appeals summarily affirmed petitioner's convictions and sentence. *United States* v. *Dillon*, 100 F.3d 949 (3d Cir. 1996) (Table). He thereafter filed a number of unsuccessful postconviction challenges to his conviction and sentence, including a motion under 28 U.S.C. 2255 to vacate, set aside, or correct his sentence. See J.A. 24; *Dillon* v. *United States*, 525 U.S. 1160 (1999) (No. 98-7429) (denying a petition for a writ of certiorari). Petitioner's Section 2255 motion raised no objections concerning the calculation of his criminal history category. See Mot. to Vacate, Set Aside, and Correct Sentence or Conviction Under 28 U.S.C. 2255 (filed Sept. 8, 1997).

5. In 2005, this Court held that the mandatory application of the Sentencing Guidelines regime violated the Sixth Amendment by permitting judges, rather than juries, to find facts necessary to support a sentence. *United States* v. *Booker*, 543 U.S. 220, 244 (2005). As a remedial matter, *Booker* severed and excised the provisions of the SRA that had made the Guidelines mandatory in sentencing decisions, resulting in a statutory scheme that directs courts to

"consider Guidelines ranges," but permits them "to tailor the sentence in light of other statutory concerns as well." *Id.* at 245-246 (citing 18 U.S.C. 3553(a)). The Court in *Booker* applied both its constitutional and its remedial holdings to all cases that were not yet final when it was decided. *Id.* at 268 (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987)). The courts of appeals have unanimously held that *Booker* is not retroactively applicable to cases that had become final on direct review before the Court's decision. See note 5, *infra*.

6. In December 2007, after the Sentencing Commission promulgated the crack cocaine amendments to the Guidelines, petitioner filed a pro se motion seeking a sentence reduction under 18 U.S.C. 3582(c)(2). Consistent with the Commission's policy statements, he argued, *inter alia*, that the total offense level calculated at his 1993 sentencing should be decreased under the crack cocaine amendments by two levels, resulting in an amended Guidelines range of 210 to 262 months. C.A. App. 109-115.

Petitioner also argued, however, that the court should consider additional reductions pursuant to the sentencing factors set out in 18 U.S.C. 3553(a), citing *United States* v. *Hicks*, 472 F.3d 1167 (9th Cir. 2007). C.A. App. 114. In *Hicks*, the Ninth Circuit held that a district court in Section 3582(c)(2) sentence modification proceedings has authority to impose a new sentence below the Guidelines range resulting from the relevant Guidelines amendment, based on its consideration of the sentencing factors in Section 3553(a). *Hicks*, 472 F.3d at 1169. The *Hicks* court reasoned that *Booker* "excised the statutes that made the Guidelines mandatory and rejected the argument that the Guidelines might remain mandatory in some cases but not in others." *Id.* at 1171-1172. The *Hicks* court thus concluded that *Booker* applies in sentence-reduction proceed-

ings under Section 3582(c)(2). *Ibid.* In connection with his *Hicks* argument, petitioner emphasized his significant institutional rehabilitation and education. C.A. App. 114. He also attached a 1999 California Superior Court order dismissing the charges in his 1990 resisting arrest case under California Penal Code § 1203.4, based on his successful completion of probation. C.A. App. 132-133. Referring to the dismissal order, petitioner argued that his criminal history category "overstate[d]" the seriousness of his criminal record. *Id.* at 114 (citing Guidelines § 4A1.3(b)(1)). Petitioner requested a new PSR and a new sentencing hearing. *Id.* at 193.

The district court granted petitioner's motion in part and denied it in part. J.A. 32-43. The court granted petitioner's motion for a sentence reduction pursuant to 18 U.S.C. 3582(c)(2), and reduced petitioner's term of imprisonment to 270 months of imprisonment: 210 months on the narcotics counts and 60 consecutive months on the firearms count. J.A. 33-36; see J.A. 44-46. But the district court denied petitioner's motion to the extent it sought a further reduction under *Booker*. J.A. 36-42. The court explained that such a reduction would be inconsistent with Section 3582(c)(2) and Guidelines § 1B1.10, which provides that a within-Guidelines sentence may not be reduced to a term of imprisonment less than the lower limit of the amended Guidelines range. J.A. 39-40. The court also rejected petitioner's argument that the court should disregard his prior California resisting arrest conviction, explaining that the court had no authority to reexamine Guidelines determinations unrelated to the crack cocaine amendments. J.A. 41-42.

7. On appeal, petitioner renewed his claim that, under *Booker*, the district court had authority to reduce his sentence beyond the two-level reduction in base offense level

authorized by the crack cocaine amendments, regardless of the limitations set out in Section 3582(c)(2) and Guidelines § 1B1.10. Pet. C.A. Br. 16-47. Petitioner also argued for the first time that his 1990 resisting arrest conviction had been improperly scored at his initial sentencing because it had not resulted in a sentence of probation of more than one year, as required by Guidelines § 4A1.2(c)(1). Pet. C.A. Br. 48-51. Petitioner argued that, by declining to revisit his criminal history score, the district court had committed procedural error under *Gall* v. *United States*, 552 U.S. 38 (2007). Pet. C.A. Br. 50.

The court of appeals affirmed. J.A. 47-55. Agreeing with the "overwhelming majority" of courts of appeals to consider the issue, the court concluded that the district court lacked authority to reduce petitioner's sentence to a term of imprisonment less than the lower limit of his amended Guidelines range. J.A. 54. The Court rejected petitioner's argument that the limitations on the scope of sentence reductions in Section 3582(c)(2) and Guidelines § 1B1.10 are invalid under *Booker*, explaining that "*Booker* applies to full sentencing hearings—whether in an initial sentencing or in a resentencing where the original sentence is vacated for error, but not to sentence modification proceedings under § 3582(c)(2)." J.A. 52-53 (quoting *United States* v. *Doe*, 564 F.3d 305, 313 (3d Cir.), cert. denied, 130 S. Ct. 563 (2009)). The court further explained that "[n]othing in *Booker* purported to obviate the congressional directive in § 3582(c)(2) that a sentence reduction pursuant to that section be consistent with Sentencing Commission policy statements," including Guidelines § 1B1.10. J.A. 53 (quoting *Doe*, 564 U.S. at 313). Finally, the court rejected petitioner's challenge to the district court's calculation of his criminal history score, concluding that the district court in Section 3582(c)(2) proceedings "had no authority to re-

consider its prior criminal history determination." J.A. 54-55.

SUMMARY OF ARGUMENT

When a district court reduces a defendant's sentence of imprisonment under 18 U.S.C. 3582(c)(2) based on a Guidelines amendment made retroactive by the Sentencing Commission, the court may not reduce the term of imprisonment by more than the amount called for by the relevant amendment, nor may it make new Guidelines determinations unrelated to the amendment.

I. Although petitioner frames the question presented in this case as whether the Sentencing Guidelines are binding when a district court resentences a defendant under Section 3582(c)(2), that formulation of the issue misapprehends the nature of Section 3582(c)(2) sentence-reduction proceedings and the role the Sentencing Guidelines play in them.

A Section 3582(c)(2) proceeding to reduce a sentence of imprisonment based on a retroactive Guidelines amendment is not a de novo sentencing under 18 U.S.C. 3553(a), or a resentencing after an earlier-imposed sentence has been found to be unlawful. Rather, Section 3582(c)(2) provides a limited exception to the statutory rule that sentences of imprisonment may not be modified. It gives district courts discretion to reduce a defendant's sentence when the Sentencing Commission has determined that a sentencing-lowering amendment should apply retroactively, provided that such a reduction is "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2). The applicable policy statement—which implements the Commission's statutory responsibility to "specify in what circumstances and by what amounts" sentences may be reduced, 28 U.S.C.

994(u)—provides that a sentence generally may not be reduced to a term that is less than the minimum of the amended Guidelines range. Guidelines § 1B1.10(b)(2).

The limited nature of sentence reductions under Section 3582(c)(2) and Guidelines § 1B1.10 raises no concerns under *United States* v. *Booker*, 543 U.S. 220 (2005). *Booker* applies when a court engages in a plenary sentencing. Section 3582(c)(2), in contrast, provides a one-way rachet to lower a defendant's otherwise-final sentence, not because of legal error, but because of the Sentencing Commission's discretionary decision to permit a Guidelines amendment to be applied retroactively to prisoners serving otherwise-final sentences. This limited reduction of the term of imprisonment of a defendant who was sentenced under mandatory Guidelines does not implicate the Sixth Amendment rule applied in *Booker*. The court does not impose an enhanced sentence based on judicially found facts, but exercises the limited discretion to decide whether to reduce an existing sentence otherwise immune from modification. Nor does *Booker*'s decision to render the Guidelines advisory for purposes of sentencing under 18 U.S.C. 3553(a) have any application to Section 3582(c)(2) proceedings. *Booker*'s remedial holding did not address sentence-reduction proceedings, and its reasoning has no application to this limited exception to otherwise-binding finality rules. Congress directed the Commission to "specify in what circumstances and by what amount" sentences "may be reduced," 28 U.S.C. 994(u), and it permitted reductions only to the extent "consistent with applicable policy statements issued by the Sentencing Commission," 18 U.S.C. 3582(c)(2). A policy statement that specifies the "amount" of the permitted reduction in a manner that corresponds to the Guidelines amendment itself permissibly implements the limited retroactive leniency that Congress authorized. Indeed, the Commission

would have had no authority to issue policy statements that contemplated a full-scale advisory-Guidelines sentencing under *Booker*, because such an approach would have failed to specify "by what amount" sentences should be reduced.

Were this Court to accept the proposition that district courts must be granted unlimited discretion to make sentence adjustments in Section 3582(c)(2) proceedings, every retroactive Guidelines amendment would carry the potential to reopen thousands of sentences of imprisonment for reevaluation under the statutory sentencing factors set out in Section 3553(a). Petitioner's proposed rule not only would undermine principles of finality that are essential to the operation of the criminal justice system, but also would inevitably affect the Sentencing Commission's calculus in deciding whether to make its Guidelines amendments retroactive in the first place. That result would diminish Section 3582(c)(2)'s value as a mechanism for the exercise of leniency.

II. Because Section 3582(c)(2) sentence-reduction proceedings do not reopen the defendant's sentence for all purposes, petitioner's contention that the district court erred in failing to correct the criminal history determination it had made at petitioner's sentencing in 1993 lacks merit. Petitioner in any event fails to establish that the determination was erroneous, much less so clearly erroneous that it would warrant correction based on petitioner's exceedingly delayed objection.

ARGUMENT

I. A REDUCTION OF A PRISONER'S SENTENCE OF IMPRISONMENT BASED ON A RETROACTIVE AMENDMENT TO THE SENTENCING GUIDELINES MUST BE CONSISTENT WITH THE COMMISSION'S POLICY STATEMENTS

Congress has provided a general rule of finality for criminal sentences, subject to limited exceptions. See 18 U.S.C. 3582(c). One such exception is based on the Sentencing Commission's determination, after its periodic review and revision of the Guidelines, 28 U.S.C. 944(*o*), to reduce a Guidelines range and make the reduction retroactive, 28 U.S.C. 944(u). When the Commission makes such a determination, it must "specify in what circumstances and by what amount" a sentenced prisoner's term of imprisonment may be reduced. *Ibid.* Section 3582(c) then gives a district court discretion to reduce the prisoner's sentence "after considering the factors set forth in section 3553(a) [of Title 18] to the extent they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. 3582(c)(2). The Commission's policy statement implementing those requirements provides that a sentence reduction may not exceed the extent of the reduction in the relevant Guidelines sentencing range, which remains the same but for the amended, retroactive Guideline. Guidelines § 1B1.10.

Petitioner contends that this limitation conflicts with *United States* v. *Booker*, 543 U.S. 220 (2005). In petitioner's view (Pet. Br. 17-20), a district court "cannot be forced to adhere to an unconstitutional and unjust Guidelines range when imposing a new sentence under § 3582(c)(2)." Instead, petitioner contends, the court must have the plenary power to impose what is effectively a new sentence under the advisory *Booker* regime—applying the

statutory sentencing factors and revisiting any previous Guidelines errors, even if unrelated to the retroactive change that triggered the Section 3582(c)(2) motion. Petitioner would thus convert Section 3582(c)(2) from a limited exception to the general rule of finality of criminal sentences into a broad vehicle for revisiting criminal sentences whenever the Sentencing Commission elects to make a particular Guidelines amendment retroactively applicable. As nine courts of appeals have correctly held,[2] *Booker* does not command that anomalous result.

A. Section 3582(c)(2) Represents A Narrow Exception To The Rule That A Sentence Of Imprisonment May Not Be Modified

1. As this Court has repeatedly recognized, finality is an important attribute of criminal judgments, and one "es-

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[2] See J.A. 47-55; *United States* v. *Washington*, 584 F.3d 693, 698-701 (6th Cir. 2009); *United States* v. *Doublin*, 572 F.3d 235, 238-239 (5th Cir.), cert. denied, 130 S. Ct. 517 (2009); *United States* v. *Savoy*, 567 F.3d 71, 73-74 (2d Cir.) (per curiam), cert. denied, 130 S. Ct. 342 (2009); *United States* v. *Fanfan*, 558 F.3d 105, 109-110 (1st Cir), cert. denied, 130 S. Ct. 99 (2009); *United States* v. *Melvin*, 556 F.3d 1190, 1192-1194 (11th Cir.), cert. denied, 129 S. Ct. 2382 (2009); *United States* v. *Cunningham*, 554 F.3d 703, 707 & n.2 (7th Cir.), cert. denied, 129 S. Ct. 2826 (2009); *United States* v. *Starks*, 551 F.3d 839, 842 (8th Cir.), cert. denied, 129 S. Ct. 2746 (2009); *United States* v. *Dunphy*, 551 F.3d 247, 254 (4th Cir.), cert. denied, 129 S. Ct. 2401 (2009); *United States* v. *Rhodes*, 549 F.3d 833, 840-841 (10th Cir. 2008), cert. denied, 129 S. Ct. 2052 (2009). But see *United States* v. *Hicks*, 472 F.3d 1167 (9th Cir. 2007). The Ninth Circuit granted initial hearing en banc to consider whether to overrule *Hicks*. *United States* v. *Fox*, 583 F.3d 596 (2009). Proceedings in *Fox* have been stayed pending the Court's resolution of this case.

sential to the operation of our criminal justice system." *Teague* v. *Lane*, 489 U.S. 288, 309 (1989) (plurality opinion); see *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("[T]he Federal Government, no less than the States, has an interest in the finality of its criminal judgments."). Once a district court has pronounced sentence and the sentence becomes final, the court may not alter that sentence except as Congress allows. See, *e.g.*, *United States* v. *Addonizio*, 442 U.S. 178, 189 & n.16 (1979); see also, *e.g.*, *United States* v. *Smartt*, 129 F.3d 539, 540 (10th Cir. 1997) ("A district court does not have inherent authority to modify a previously imposed sentence; it may do so only pursuant to statutory authorization.") (citation omitted); *United States* v. *Caterino*, 29 F.3d 1390, 1394 (9th Cir. 1994) ("The authority to change a sentence must derive from some federal statutory authority.").

Consistent with those principles of finality, the SRA provides that a court generally "may not modify a term of imprisonment once it has been imposed." 18 U.S.C. 3582(c). That rule is subject to three exceptions, collectively designed to serve as "safety valves" for prisoners serving already-imposed sentences. S. Rep. No. 225, 98th Cong., 1st Sess. 121 (1983) (1983 Senate Report). The exception at issue in this case provides that a court "may reduce the term of imprisonment" of a defendant who had been "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission." 18 U.S.C. 3582(c)(2).[3] The stat-

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[3] Another exception permits a court to reduce an imposed term of imprisonment, on motion of the Director of the Bureau of Prisons, if "extraordinary and compelling reasons warrant such a reduction" or the defendant is, *inter alia*, at least 70 years old and has served at least 30 years in prison, provided that "such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

ute directs the court, before granting such a reduction, to consider the statutory sentencing factors set out in 18 U.S.C. 3553(a) "to the extent that they are applicable." 18 U.S.C. 3582(c)(2). And the statute instructs that the court may grant such a reduction only if it "is consistent with applicable policy statements issued by the Sentencing Commission." *Ibid.*

2. Section 3582(c)(2)'s requirement that a sentence reduction be consistent with the Sentencing Commission's policy statements works together with other provisions of the SRA describing the Commission's duties and powers. In particular, the SRA charges the Commission with periodically reviewing and revising the Sentencing Guidelines. 28 U.S.C. 994(*o*). If in the course of its revisions the Commission "reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," another provision of the SRA directs the Commission to "specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. 994(u). That provision gives the Commission "the unusual explicit power to decide whether and to what extent its amendments reducing sentences will be given retroactive effect."

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18 U.S.C. 3582(c)(1)(A). That exception applies "to the unusual case in which the defendant's circumstances are so changed, such as by terminal illness, that it would be inequitable to continue the confinement of the prisoner." 1983 Senate Report 121.

The final exception permits a court to "modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." 18 U.S.C. 3582(c)(1)(B). Rule 35, among other things, permits a district court, on the government's motion, to reduce a sentence if the defendant after sentencing has "provided substantial assistance in investigating or prosecuting another person." Fed. R. Crim. P. 35(b).

Braxton v. *United States*, 500 U.S. 344, 348 (1991) (emphasis omitted).

3. The Sentencing Commission has implemented its statutory authority in this area by promulgating Guidelines § 1B1.10, a policy statement governing reduction of sentences under Section 3582(c)(2). See *Braxton*, 500 U.S. at 348; see also 28 U.S.C. 994(a)(2)(C) (directing the Sentencing Commission to issue policy statements regarding "the appropriate use" of the sentence modification provisions in Section 3582(c)).

Guidelines § 1B1.10 sets out the Guideline amendments that apply retroactively. Guidelines § 1B1.10(c). As amended in 2007, Section 1B1.10 also sets out instructions for determining the maximum permissible reduction for an appropriately sentenced defendant based on a Guidelines amendment. It provides that, "[i]n determining whether, and to what extent, a reduction in the defendant's term of imprisonment * * * is warranted," a district court should begin by "determin[ing] the amended guideline range that would have been applicable to the defendant if the amendment[] to the guidelines * * * had been in effect at the time the defendant was sentenced," while "leav[ing] all other guideline application decisions unaffected." Guidelines § 1B1.10(b)(1). If a defendant received a within-Guidelines sentence, a court may not reduce the defendant's term of imprisonment "to a term that is less than the minimum of the amended guidelines range." Guidelines § 1B1.10(b)(2)(A); accord *id.* comment. (n.3).[4]

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[4] If a defendant was originally sentenced to a term of imprisonment less than the term provided by the Guidelines range, Guidelines § 1B1.10 provides that the court may reduce the defendant's sentence by an amount "comparably less than the amended guideline range," but states that a sentence reduction under Section 3582(c)(2) and Guidelines § 1B1.10 generally is not appropriate "if the original term of imprison-

Although petitioner repeatedly characterizes Guidelines § 1B1.10 as an instruction to district courts to impose sentences based on a newly calculated, mandatory Guidelines range, see, *e.g.*, Pet. Br. 22, 27, the effect of Guidelines § 1B1.10 is more limited: it simply instructs district courts how to calculate the scope of the benefit a retroactive Guidelines amendment offers a particular defendant. See 28 U.S.C. 994(u). Notably, the Sentencing Commission could have exercised its statutory power to "specify * * * by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced," *ibid.*, by other means. The Commission could have instructed, for example, that sentence reductions are not to exceed a specified percentage of the defendant's original Guidelines sentence. It also could have issued a set of tables prescribing the maximum number of months to be subtracted from Guidelines sentences of various lengths under various amendments (*e.g.*, 52 months from a sentence of 262 months under the crack cocaine amendments). The mechanism the Sentencing Commission chose, however, results in a relatively simple, precise determination in individual cases of the scope of the relevant changes associated with a particular Guidelines amendment.

4. Because Section 3582(c)(2) requires that a sentence reduction be "consistent with applicable policy statements issued by the Sentencing Commission," 18 U.S.C. 3582(c)(2), Guidelines § 1B1.10 binds courts in determining whether, and to what extent, a Guidelines amendment warrants a reduction in a defendant's final term of imprison-

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ment constituted a non-guideline sentence determined pursuant to 18 U.S.C. § 3553(a) and *United States v. Booker*, 543 U.S. 220 (2005)." Guidelines § 1B1.10(b)(2)(B).

ment. See, *e.g.*, *United States* v. *Fanfan*, 558 F.3d 105, 109 (1st Cir.), cert. denied, 130 S. Ct. 99 (2009); *United States* v. *Cunningham*, 554 F.3d 703, 708 (7th Cir.), cert. denied, 129 S. Ct. 2826 (2009); *United States* v. *Walsh*, 26 F.3d 75, 77 (8th Cir. 1994) ("Congress has made the policy statements set forth in § 1B1.10 the applicable law for determining whether a district court has the authority to reduce a sentence [under Section 3582(c)(2).").

Petitioner (Pet. Br. 35 n.18), and his amici (Fed. Defenders Br. 10-22), argue that, although the Sentencing Commission's decision whether a particular Guidelines amendment reducing sentences should be applied retroactively is binding under the SRA, a district court is not bound by the Commission's determination as to the extent of the permissible reduction. But the statute charges the Commission with specifying both "in what circumstances" and "by what amount" a sentence of imprisonment may be reduced in accordance with an amendment to the Guidelines. 28 U.S.C. 994(u); see *Braxton*, 500 U.S. at 348 (describing Section 994(u) as giving the Commission "the unusual explicit power to decide whether *and to what extent* its amendments reducing sentences will be given retroactive effect") (emphasis omitted and added). Neither petitioner nor his amici offer a persuasive reason for distinguishing as a statutory matter between the effect of the Commission's specification "whether" a Guideline amendment justifies reducing already imposed sentences and its specification about the "extent" of the permissible reduction.

5. The combined effect of Section 3582(c)(2) and Guidelines § 1B1.10 is to require that, when a district court reduces a sentence of imprisonment based on a Guidelines amendment reducing sentencing ranges, the reduction not exceed the extent of the change to the relevant sentencing

range. That is a logical implementation of statutory provisions that make a limited inroad on finality only in recognition of a lowered Guidelines range. The sole purpose of the proceeding is to give the court discretion to lower the term of imprisonment in view of the Commission's "revise[d]" judgment about the appropriate Guidelines range. 28 U.S.C. 994(*o*). Congress did not empower the Commission to license courts to engage in wholesale, plenary resentencings.

B. Limitations On The Amount By Which A Term Of Imprisonment May Be Reduced Under Section 3582(c)(2) Do Not Implicate *Booker*

Petitioner contends (Pet. Br. 21-38) that the limitation on sentence reductions under Section 3582(c)(2) and Guidelines § 1B1.10 are invalid under *Booker*. Petitioner's contention lacks merit.

1. In Booker, *the Court addressed imposition of sentences under Section 3553, not discretionary reductions of otherwise-final judgments*

In *Booker*, this Court held that the Sixth Amendment right to a jury trial is violated when a defendant's sentence is increased based on judicial factfinding under mandatory federal Sentencing Guidelines. 543 U.S. at 226-244. To remedy the constitutional defect in the Guidelines scheme, the Court severed two provisions of the SRA: 18 U.S.C. 3553(b)(1), which had required courts to impose a Guidelines sentence, and 18 U.S.C. 3742(e), which required de novo review of decisions to depart from the Guidelines and cross-referenced Section 3553(b)(1). *Booker*, 543 U.S. at 245-246, 259-261. In so doing, the Court made "the Guidelines effectively advisory." *Id.* at 245. Now, as modified in *Booker*, the SRA "requires a sentencing court to consider Guidelines ranges" but "permits the court to tailor the sen-

tence in light of other statutory concerns as well." *Id.* at 245-246 (citing 18 U.S.C. 3553(a)). Accord *Gall* v. *United States*, 552 U.S. 38, 49-50 (2007) ("A district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range," but "should then consider all of the § 3553(a) factors to determine whether they support a sentence requested by a party.").

The Court in *Booker* applied both its constitutional and its remedial holdings to all cases that were not yet final when it was decided. 543 U.S. at 268 (citing *Griffith* v. *Kentucky*, 479 U.S. 314, 328 (1987)). The Court did not, however, apply its holdings to cases that were already final and unappealable when the decision issued, and it is undisputed in this case that *Booker* does not apply retroactively to cases that were final as of 2005.[5]

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[5] Every court of appeals to address the issue has so held. See *Cirilo-Muñoz* v. *United States*, 404 F.3d 527, 532-533 (1st Cir. 2005); *Guzman* v. *United States*, 404 F.3d 139, 141-144 (2d Cir.), cert. denied, 546 U.S. 1035 (2005); *Lloyd* v. *United States*, 407 F.3d 608, 613-616 (3d Cir.), cert. denied, 546 U.S. 916 (2005); *United States* v. *Morris*, 429 F.3d 65, 66-67 (4th Cir. 2005), cert. denied, 549 U.S. 852 (2006); *United States* v. *Gentry*, 432 F.3d 600, 602-605 (5th Cir. 2005); *Humphress* v. *United States*, 398 F.3d 855, 860-863 (6th Cir.), cert. denied, 546 U.S. 855 (2005); *McReynolds* v. *United States*, 397 F.3d 479, 481 (7th Cir.), cert. denied, 545 U.S. 1110 (2005); *Never Misses a Shot* v. *United States*, 413 F.3d 781, 783-784 (8th Cir. 2005); *United States* v. *Cruz*, 423 F.3d 1119, 1121 (9th Cir. 2005), cert. denied, 546 U.S. 1155 (2006); *United States* v. *Bellamy*, 411 F.3d 1182, 1188 (10th Cir. 2005); *Varela* v. *United States*, 400 F.3d 864, 867-868 (11th Cir.), cert. denied, 546 U.S. 924 (2005); *In re Fashina*, 486 F.3d 1300, 1306 (D.C. Cir. 2007). Petitioner does not contend otherwise.

2. *A reduction of a defendant's sentence under Section 3582(c)(2) is not the equivalent of imposition of a new sentence under Section 3553(a)*

Petitioner's sentence became final in 1996, well before *Booker* was decided. See p. 9, *supra*; see also, *e.g.*, *Clay* v. *United States*, 537 U.S. 522, 527 (2003) (a criminal judgment becomes final after appeal when the time for filing a petition for a writ of certiorari expires). Petitioner does not dispute that, absent the Sentencing Commission's decision to make its crack cocaine amendments retroactive, he would not be entitled to reevaluation of his sentence under *Booker*. He argues, however, that once the Sentencing Commission opened the door to a sentence reduction under Section 3582(c)(2), the resulting proceeding, like "any other resentencing," must comport with *Booker*, and thus must permit the district court to impose a new sentence under the advisory Guidelines regime *Booker* announced. Pet. Br. 22-23.

a. Petitioner's argument fails at the outset because a Section 3582(c)(2) proceeding to reduce a sentence of imprisonment is not, as petitioner would have it (Pet. Br. 18, 22-25), the equivalent of the imposition of a new sentence under 18 U.S.C. 3553(a). Despite petitioner's description of Section 3582(c)(2) as "resentencings," see, *e.g.*, Pet. Br. 22, 25, numerous procedural and substantive distinctions establish that Section 3582(c)(2) proceedings are not equivalent to initial sentencings or resentencings after an original sentence has been found to be unlawful. See, *e.g.*, *United States* v. *Bravo*, 203 F.3d 778, 781 (11th Cir.) ("[A] sentencing adjustment undertaken pursuant to Section 3582(c)(2) does not constitute a de novo resentencing.") (citation omitted), cert. denied, 531 U.S. 994 (2000); *United States* v. *Tidwell*, 178 F.3d 946, 949 (7th Cir.) (a motion pursuant to Section 3582(c)(2) "is not a do-over of an original sentencing

proceeding"), cert. denied, 528 U.S. 1023 (1999); *United States* v. *Torres*, 99 F.3d 360, 362 (10th Cir. 1996) (describing Section 3582(c)(2) as "a different animal" than de novo resentencing), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) ("A § 3582(c)(2) motion is not a second opportunity to present mitigating factors to the sentencing judge, nor is it a challenge to the appropriateness of the original sentence. Rather, it is simply a vehicle through which appropriately sentenced prisoners can urge the court to exercise leniency to give certain defendants the benefits of an amendment to the Guidelines.").[6]

A court in a Section 3582(c)(2) proceeding does not impose a "new sentence" under 18 U.S.C. 3553(a), as it would at an initial sentencing or plenary resentencing. Pet. Br. 23. The court has no power to increase the defendant's sentence based on its consideration of the statutory sentencing factors in Section 3553(a); it lacks authority to modify components of a sentence other than the term of imprisonment (such as the length or conditions of supervised release, fines, or restitution); and its discretion to reduce the defendant's sentence is expressly limited by "applicable policy statements" issued by the Sentencing Commission. 18 U.S.C. 3582(c)(2).

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[6] Petitioner quotes *United States* v. *Byfield*, 391 F.3d 277 (D.C. Cir. 2004), for the proposition that there is "no material distinction, for these purposes, between initial sentencings and § 3582(c)(2) revisions." Pet. Br. 23. The "purposes" in question in *Byfield* concerned a defendant's entitlement under Guidelines § 6A1.3 to a hearing to present expert evidence on a disputed question about the application of the Guidelines amendment at issue in his case. 391 F.3d at 279-280. *Byfield* did not suggest, contrary to the overwhelming weight of authority, that Section 3582(c)(2) sentence reduction proceedings are essentially identical in nature to initial sentencing decisions.

Those critical substantive differences carry with them a host of equally important procedural differences. At sentencing, the defendant has the right to counsel, *Mempa* v. *Rhay*, 389 U.S. 128, 137 (1967), and the right to be present, see *United States* v. *DeMott*, 513 F.3d 55, 58 (2d Cir. 2008). In contrast, the defendant has neither right in Section 3582(c)(2) proceedings. See Fed. R. Crim. P. 43(b)(4) (a defendant need not be physically present for a sentence modification pursuant to Section 3582(c)(2)); *United States* v. *Harris*, 568 F.3d 666, 669 (8th Cir. 2009) (a defendant has no right to the assistance of counsel in a sentence modification proceeding under Section 3582(c)(2)); *United States* v. *Webb*, 565 F.3d 789, 794 (11th Cir. 2009) (same); *United States* v. *Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (same), cert. denied, 531 U.S. 1080 (2001); *Tidwell*, 178 F.3d at 949 (same); *United States* v. *Townsend*, 98 F.3d 510, 512-513 (9th Cir. 1996) (same); *Whitebird*, 55 F.3d at 1011 (same); *United States* v *Reddick*, 53 F.3d 462, 464-465 (2d Cir. 1995) (same). Although, as one court of appeals recently held, a defendant should be afforded notice of, and an opportunity to respond to, new information on which a district court relies in deciding whether to reduce the defendant's sentence under Section 3582(c)(2), the court of appeals also explained that, "[b]ecause a § 3582(c)(2) proceeding is not a *de novo* resentencing, courts need not permit re-litigation of any information available at the original sentencing," and that the opportunity to contest new information generally need not take the form of a hearing. *United States* v. *Jules*, No. 08-13629, 2010 WL 348044, at *5 (11th Cir. Feb. 2, 2010); see *id.* at *1, *5-*6 (remanding to allow the defendant to contest a prison sanctions report on which the district court had relied in denying the defendant's Section 3582(c)(2) motion, but noting that the district court could

"allow the parties to contest new information in writing" rather than holding a hearing).

And unlike the proceedings in the cases on which petitioner relies (Pet. Br. 23-24), a Section 3582(c)(2) proceeding is not the equivalent of resentencing after a court has found an earlier-imposed sentence unlawful on direct appeal, see 18 U.S.C. 3742(g) (on remand following appeal, the district court "shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals"), or resentencing following collateral review. When a court resentences a defendant because of an error in an earlier-imposed sentence, the court must impose "a new sentence" to replace one that has been vacated or set aside. *United States* v. *Arrous*, 320 F.3d 355, 359 (2d Cir. 2003). That sentence, of course, must comport with current law. See *Griffith*, 479 U.S. at 328. Under Section 3582(c)(2), in contrast, a district court merely decides whether to exercise its discretion to reduce an otherwise final sentence of imprisonment based on a specifically listed amendment to the Guidelines. Section 3582(c)(2) is not a mechanism for incorporating all subsequent legal developments into the sentence. Indeed, if it were, any defendant eligible to invoke Section 3582(c)(2) could insist on retroactive application of all sentence-reducing amendments, whether or not the Commission had designated them as retroactive. See *Torres*, 99 F.3d at 362-363 (explaining that, if "a § 3582(c)(2) motion require[d] resentencing under all then-current sentencing guidelines[, it] would negate the limit on retroactivity provided by § 1B1.10").

b. Petitioner argues (Pet. Br. 22-23, 24-25) that a Section 3582(c)(2) proceeding is nevertheless similar to a resentencing after remand because the statute directs district courts to "consider[] the factors set forth in section

3553(a) to the extent they are applicable," 18 U.S.C. 3582(c)(2); cf. 18 U.S.C. 3742(g) (directing district courts on remand to resentence a defendant in accordance with Section 3553). Section 3582(c)(2)'s reference to Section 3553(a) does not, however, mean that the "discretionary aspects of resentencings under § 3582(c) and § 3742 are the same." Pet. Br. 25. A court properly considers Section 3553(a) factors only "to the extent they are applicable" in deciding whether to grant the maximum permissible sentence reduction consistent with the applicable policy statements, to grant a lesser reduction, or to leave the defendant's sentence as is. See, *e.g.*, *Cunningham*, 554 F.3d at 708; *Dunphy*, 551 F.3d at 255; cf. *United States* v. *Shelby*, 584 F.3d 743, 748-749 (7th Cir. 2009) (Posner, J.) (applying a similar rule to sentence reductions under Federal Rule of Criminal Procedure 35(b)). Section 3582(c)(2) does not direct the court to evaluate, as an original matter, whether the defendant's sentence of imprisonment comports with the Section 3553(a) factors.[7]

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[7] Petitioner also contends (Pet. Br. 25) that the SRA "puts resentencings under § 3582(c) and those following reversal under § 3742 on an equal footing" in 18 U.S.C. 3582(b). That provision states that, notwithstanding that a sentence of imprisonment can be modified, corrected, or appealed, "a judgment of conviction that includes such a sentence constitutes a final judgment for all other purposes." 18 U.S.C. 3582(b). The affirmation that an otherwise final sentence may be modified, corrected, or appealed does not suggest that the modification contemplated by Section 3582(c)(2) is, in effect, the equivalent of resentencing following a remand on appeal.

3. A district court does not violate the Sixth Amendment when it uses a defendant's final, pre-Booker sentence as a baseline for a sentence reduction under Section 3582(c)(2)

Contrary to petitioner's contention (Pet. Br. 28-31), a district court does not violate the Sixth Amendment when it reduces a sentence under Section 3582(c)(2) without undertaking a plenary resentencing under *Booker*.

Booker's constitutional holding applied the rule that, "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Booker*, 543 U.S. at 231 (quoting *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000)). That rule has no direct application to proceedings under Section 3582(c)(2), since the statute permits a district court only to reduce—not increase—the defendant's sentence.

Petitioner contends that, "[w]hen a court binds itself to 'a defendant's previous, unconstitutional sentence as a baseline for a new sentence,' it reoffends the Sixth Amendment." Pet. Br. 29 (quoting *United States* v. *Lafayette*, 585 F.3d 435, 438 (D.C. Cir. 2009)). But when a district court acts on a Section 3582(c)(2) motion to reduce a sentence of imprisonment, it never "start[s] from scratch." *Lafayette*, 585 F.3d at 438. Any "constitutional infirmities" that may inhere in the sentence are "features of earlier sentencing decisions," rather than of the district court's subsequent decision whether to reduce the sentence under Section 3582(c)(2). *Ibid.* (rejecting the defendant's argument that, "by denying his section 3582(c)(2) motion, the district court effectively reimposed his sentence and unearthed its latent defects"). A court no more commits a Sixth Amendment violation by reducing a sentence under Section 3582(c)(2) to

account only for a retroactively applicable Guidelines amendment than it does when it exercises its discretion under Section 3582(c)(1) to reduce a sentence, on motion of the Director of the Bureau of Prisons, for "extraordinary and compelling reasons," or because the defendant is over the age of 70 and has served 30 years or more. 18 U.S.C. 3582(c)(1)(A). Either reduction represents only the exercise of leniency for a defendant with no legal entitlement.

The analysis does not change, as petitioner appears to suggest, simply because "a section 3582(c)(2) sentence reduction requires a new Guidelines calculation." Pet. Br. 29 (quoting *Lafayette*, 585 F.3d at 438). As explained above, to the extent a "new" Guidelines calculation is required in Section 3582(c)(2), it is only to determine the extent of the benefit offered to a particular defendant because of a retroactive amendment to Guidelines sentencing ranges. The Commission could just as well have required the district court simply to subtract from the defendant's term of imprisonment a specified number of months, or a specified percentage of the total sentence, keyed to the scope of the relevant change in the Guidelines. See p. 21, *supra*. The constitutionality of the limitations on sentence reductions under Section 3582(c)(2) cannot turn on the particular procedural mechanism the Sentencing Commission has chosen to "specify * * * by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced" because of a Guidelines amendment. 28 U.S.C. 994(u).

4. Limitations on the permissible extent of sentence reductions under Section 3582(c)(2) are not inconsistent with the SRA as modified in Booker

Finally, petitioner errs in asserting (Pet. Br. 31-38) that the limitations on sentence reductions in Section 3582(c)(2)

and Guidelines § 1B1.10 are inconsistent with the statutory scheme as modified in *Booker*'s remedial opinion.

a. In *Booker*, this Court excised and severed 18 U.S.C. 3553(b), the provision that made the Guidelines mandatory on district courts in sentencing proceedings, as well as the related provision governing appellate review, 18 U.S.C. 3742(e), which cross-references the excised Section 3553(b)(1). The Court held that, "[w]ith these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements." *Booker*, 543 U.S. at 259.

Petitioner contends (Pet. Br. 31-34) that, under *Booker*'s remedial holding, Guidelines § 1B1.10, "[l]ike all other Guidelines," should be regarded as advisory. *Id.* at 32 (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 91 (2007). But *Booker* severed and excised only provisions of the SRA that made the Guidelines mandatory in district courts' initial sentencing decisions and appellate review of those decisions. *Booker* did not address Section 3582(c)(2), much less did it hold that Section 3582(c)(2)'s requirement that sentence reductions be consistent with "applicable policy statements" is no longer in force. And nothing in the reasoning of *Booker* casts any doubt on Congress's ability to rely on the Sentencing Commission's policy statements to define the scope of sentence reduction warranted by the Commission's amendments to the Guidelines. That limitation on district courts' discretion to reduce sentences under Section 3582(c)(2) raises no Sixth Amendment concerns. See pp. 30-31, *supra*. It "function[s] independently" from those provisions that *Booker* did sever and excise. 543 U.S. at 259. And to preserve Section 3582(c)(2) as Congress wrote it is certainly consistent with "Congress' basic objectives" in enacting the SRA. *Ibid.*

b. In *United States* v. *Hicks*, 472 F.3d 1167, 1171-1172 (2007), the Ninth Circuit suggested that this Court's conclusion that the Guidelines could not remain mandatory in some contexts and advisory in others compels the conclusion that policy statements cannot be binding in Section 3582(c)(2) proceedings. See *Booker*, 543 U.S. at 265-266; see also Pet. Br. 33. That suggestion is mistaken. In the passage on which *Hicks* relied, the Court responded to the government's contention that, if the Court reached the issue of remedy, it should make "the Guidelines advisory in 'any case in which the Constitution prohibits' judicial factfinding," but should "leave them as binding in all other cases." *Booker*, 543 U.S. at 266. The Court rejected that approach because of its asymmetry: it would leave the Guidelines in place as a mandatory floor, but would allow judges to sentence above the range without limit. The Court did "not believe that such 'one-way lever[s]' are compatible with Congress' intent." *Ibid.* It also believed that Congress would not have authorized a system so laden with "administrative complexities" and so unlikely to promote its basic objective of uniformity. *Ibid.*

Section 3582(c)(2) proceedings do not implicate the concerns raised by the two-track approach rejected in *Booker*. Unlike plenary sentencings, Section 3582(c)(2) proceedings are inherently asymmetrical: a defendant can receive a sentence reduction, but never an increase. Congress thus deliberately adopted a "one-way lever" in this context, with applicable limitations to be set by the Commission. See 28 U.S.C. 994(u); 18 U.S.C. 3582(c)(2). And while the Court's adoption of a wholly advisory system avoided "administrative complexities" in *Booker*, extension of that remedy to a context the Court never considered—sentence-reduction proceedings for defendants whose Guidelines ranges were lowered—would engender considerable administrative

complexities. See pp. 36-37, *infra*. Finally, Congress's basic objective of uniformity would be seriously compromised by converting Section 3582(c)(2) proceedings into full-scale advisory Guidelines sentencing proceedings. Virtually all defendants sentenced in the mandatory-Guidelines era have lacked any opportunity for application of the *Booker* remedy because it is not retroactive to cases on collateral review. See note 5, *supra*. No principled reason justifies an exception for only those defendants who can seek limited statutory relief because the Commission reduced one component of their Guidelines sentences and made that change retroactive.

c. Petitioner also argues (Pet. Br. 32-33, 35-36) that, even if Section 3582(c)(2), as written, survived *Booker*'s remedial decision, Guidelines § 1B1.10 does not, because it directs district courts in Section 3582(c)(2) proceedings "to treat the Guidelines range as binding," and "prevent[s] the district court from fashioning a sentence that complies with its statutory directive to 'impose a sentence sufficient, but not greater than necessary to accomplish the goals of sentencing.'" *Id.* at 35-36 (quoting *Kimbrough*, 552 U.S. at 101). But as explained above, see pp. 25-29, the purpose of Section 3582(c)(2) proceedings is not to "fashion[]" an entirely new sentence under the statutory sentencing factors set out in Section 3553(a). It is, rather, to permit district courts to give defendants serving sentences of imprisonment the benefit of the Sentencing Commission's decisions to alter Guidelines ranges.

To the extent that Guidelines § 1B1.10 directs district courts to treat the Guidelines as "binding" for the purpose of calculating the scope of the benefit offered to defendants in particular cases, the Commission is only fulfilling its obligation under 28 U.S.C. 994(u) to specify "by what amount the sentences of prisoners serving terms of imprisonment

for the offense may be reduced." The Commission would have had no authority to authorize a free-form resentencing under *Booker*, in which a court's consideration of the Section 3553(a) factors would result in an unpredictable sentence, varying from case to case and court to court. Such an approach would fail to say "by what amount" a sentence should be reduced and thus fall short of the requirements of Section 994(u). And the calculation methodology the Commission selected raises none of the constitutional concerns underlying *Booker*'s remedial holding.[8]

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[8] Petitioner's analogy (Pet. Br. 36-38) to Rule 35(b) does not help his argument. Much as in Section 3582(c)(2) proceedings, a court in Rule 35(b) sentence reduction proceedings has no authority to "redo the sentence from the ground up," consulting "factors that he would consider in initial sentencing under the *Booker* regime." *Shelby*, 584 F.3d at 744, 746, 748-750. But see *United States* v. *Grant*, 567 F.3d 776, 781-784 (6th Cir.), reh'g en banc granted, No. 07-3831 (6th Cir. Oct. 16, 2009). That Rule 35(b) has been amended to omit reference to the Guidelines, see Pet. Br. 37, is unremarkable, given that Rule 35(b), unlike Section 3582(c)(2), is not designed to give defendants a benefit based on changes to the Guidelines. It is instead designed to reward previously sentenced defendants who have rendered substantial assistance to the government. See *Shelby*, 584 F.3d at 745; see also *United States* v. *Williams*, 474 F.3d 1130 (8th Cir. 2007) (court may not reduce a sentence below the mandatory minimum after a government motion based on substantial assistance under 18 U.S.C. 3553(e) by invoking Section 3553(a) factors and *Booker*).

C. Petitioner's Proposed Rule Would Have Adverse Consequences For The Application Of Section 3582(c)(2)

The rule petitioner proposes is not only unjustified by *Booker*, but inconsistent with the policy objectives underlying Section 3582(c)(2).

1. To begin with, the rule petitioner proposes would undermine the principles of finality that underlie Section 3582(c). It would convert a proceeding designed as a limited exception to the final judgment rule into the equivalent of de novo resentencing, and thus would turn every retroactive Guidelines amendment into "a significant collateral windfall to all affected prisoners, reopening every aspect of their original sentences." *Lafayette*, 585 F.3d at 438.

The effects on the criminal justice system would be significant. The crack cocaine amendments alone have already prompted more than 23,000 motions for sentence reductions under Section 3582(c)(2), more than 15,000 of which have been granted. 2010 Data Report Tbl. 1. More than 13,000 motions have been filed by prisoners sentenced before *Booker* was decided in 2005. *Id.* Tbl. 3. It is unlikely that Congress, already concerned about the potential burden on the courts associated with the Sentencing Commission's power to declare amendments retroactive, see 1983 Senate Report 180, would have intended application of Section 3582(c)(2) to permit broadly reopening the sentences of thousands of previously sentenced defendants.

2. Equally important, petitioner's rule would inevitably affect the Sentencing Commission's consideration of whether to make its Guidelines amendments retroactive in the first place.

The prospect of reopening sentences for all purposes was a central concern in the deliberations that led to the Commission's decision to make the crack cocaine amendments retroactive. The Commission had estimated

that some 19,500 defendants would be eligible to seek sentence reductions if the amendments were made retroactive. See Memorandum from Glenn Schmitt et al. to Chair Hinojosa et al. 4 (Oct. 3, 2007), http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf. The Commission was, moreover, aware of the Ninth Circuit's decision in *Hicks*, *supra*, which had held that a defendant in sentence reduction proceedings under Section 3582(c)(2) was entitled to reevaluation of his sentence under *Booker*. See, *e.g.*, United States Sentencing Commission, *Public Hearing on Retroactivity* 29 (Nov. 13, 2007), http://www.ussc.gov/hearings/11_13_07/Transcript111307.pdf (Commissioner Horowitz); *id.* at 76 (Commissioner Steer); *id.* at 163 (Judge Castillo). When the Commission ultimately decided to make the crack cocaine amendments retroactive, it did so in reliance on the well-settled principle that Section 3582(c)(2) proceedings do not constitute full resentencings, see pp. 24-28, *supra*, and simultaneously amended Guidelines § 1B1.10 to reflect that understanding, 73 Fed. Reg. at 218.

To forbid the Sentencing Commission from limiting the scope of Section 3582(c)(2) sentence reduction proceedings to the scope of the amendments themselves would inevitably discourage the Sentencing Commission from ever authorizing sentence reductions. Cf. *Shelby*, 584 F.3d at 746-747 ("Allowing the judge to redo the sentence from the ground up when a Rule 35(b) [sentence-reduction] motion is filed would almost certainly reduce the number of such motions filed."). The consequence would be to diminish Section 3582(c)(2)'s value as a mechanism for granting leniency to defendants who, like petitioner, would seek the benefit of the Sentencing Commission's decision to lower Guidelines ranges.

II. THE COURTS BELOW DID NOT ERR IN FAILING TO CORRECT A PURPORTED ERROR IN PETITIONER'S CRIMINAL HISTORY CATEGORY UNDER THE GUIDELINES

Petitioner contends (Pet. Br. 39-49) that the district court erred in failing to correct a purported error it had made in calculating his Guidelines criminal history category at his original sentencing in 1993, and that the court's failure to do so independently warrants vacating his sentence and remanding for resentencing. Petitioner's contention lacks merit.

To begin with, petitioner's argument furnishes no independent ground for relief: it depends critically on the contention that the Section 3582(c)(2) proceedings entitled him to sentence adjustments wholly unrelated to the Guidelines amendment that authorized him to seek a sentence reduction in the first place. For the reasons explained above, that contention fails. In any event, petitioner fails to establish any error in the calculation of his criminal history category, much less an error that would warrant correction despite petitioner's marked tardiness in raising the objection.[9]

1. a. Petitioner's claim of error rests on the district court's treatment of his 1990 California misdemeanor con-

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[9] In his petition for a writ of certiorari, petitioner claimed (without citation) that "[t]he parties agree that at the original sentencing, the probation officer improperly assessed [petitioner] one point." Pet. 39; accord Pet. i (phrasing the second question presented as "Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range."). That claim is incorrect, and petitioner notably does not repeat it in his opening brief on the merits. The government did not concede in the courts below that petitioner's criminal history score was incorrectly calculated, and as explained below, petitioner has failed to establish that the score was in fact erroneous. See pp. 42-44, *infra*.

viction for resisting arrest. In the PSR prepared in connection with his 1993 sentencing, the Probation Office reported the disposition of the charges as follows: "Pled guilty. Imposition of sentence suspended. 2 years' probation, credit for 2 days' time served." PSR ¶ 47. The PSR further reported that petitioner had been charged with possession of crack cocaine in addition to resisting arrest; that he had been placed in a six-month diversion program; and that he successfully completed that program in December 1990. *Ibid.* The PSR assigned one criminal history point for the resisting arrest conviction based on Guidelines § 4A1.1(c), which prescribes one point for each prior criminal sentence not involving a term of imprisonment of at least 60 days. The PSR also noted that counting the conviction was consistent with Guidelines § 4A1.2(c)(1), which provides that a sentence for certain misdemeanor offenses, including resisting arrest, are counted only if, as relevant here, "the sentence was a term of probation of at least one year or a term of imprisonment of at least thirty days." Sentencing Guidelines §§ 4A1.1(c), 4A1.2(c)(1) (1993); see PSR ¶ 47.

Petitioner did not object to the PSR's calculation of his criminal history score, see PSR Addendum 80-83, and the district court adopted that calculation at sentencing, C.A. App. 90, J.A. 10-11. Petitioner did not challenge his criminal history score on appeal, nor did he raise any objection based on the miscalculation of his criminal history category in his Motion to Vacate, Set Aside, and Correct Sentence or Conviction under 28 U.S.C. 2255 (filed Sept. 8, 1997).

In 1999, petitioner filed a postconviction motion to review his sentence; in a supplement to the motion, he reported that the Superior Court of California that year had issued an order permitting him to withdraw his guilty plea to the resisting arrest conviction and dismissing charges pursuant to California Penal Code § 1203.4, and he argued

that his sentence should be recalculated accordingly. J.A. 27. The district court denied the motion, explaining, *inter alia*, that "the setting aside of a conviction under California Penal Code Section 1203.4 has no effect on the calculation of his sentence under the federal sentencing guidelines." J.A. 28; see Guidelines § 4A1.2 comment. (n.10) (directing that convictions set aside under state law are to be counted in computing the defendant's criminal history category); Cal. Penal Code § 1203.4 (providing that "in any subsequent prosecution of the defendant for any other offense, the prior conviction may be pleaded and proved and shall have the same effect as if probation had not been granted or the accusation or information dismissed").

b. In his Section 3582(c)(2) motion in district court, petitioner again raised the dismissal of his resisting arrest charges under California Penal Code § 1203.4, and argued that his criminal history category accordingly "overstate[d]" the seriousness of his criminal record. C.A. App. 114 (citing Guidelines § 4A1.3(b)(1)). The district court rejected the argument, explaining that it had no authority to reexamine Guidelines determinations not affected by the crack cocaine amendments. J.A. 41-42.

On appeal, petitioner for the first time raised the argument he now makes in this Court: that petitioner's criminal history category had been incorrectly calculated from the start because petitioner had not been sentenced to "a term of probation of at least one year or a term of imprisonment of at least thirty days," as required by Guidelines § 4A1.2(c)(1). See Pet. C.A. Br. 48-51.

c. Because petitioner failed to present the argument to the district court, the district court's failure to correct that purported error in petitioner's Section 3582(c)(2) proceedings is reviewable, at most, for plain error under Federal Rule of Procedure 52(b). Under the plain-error rule, a de-

fendant must demonstrate that he suffered obvious error resulting in prejudice, and that the error "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 469 (1997). Petitioner cannot make that showing.

2. As an initial matter, petitioner's argument that the district court in his Section 3582(c)(2) proceedings was not only permitted, but obligated, to correct the purported error in the calculation of his criminal history score rests critically on the proposition that *Booker* invalidates the limitations on sentencing reduction proceedings embodied in Section 3582(c)(2) and Guidelines § 1B1.10.

Contrary to petitioner's argument (Pet. Br. 46-47), Section 3582(c)(2) and Guidelines § 1B1.10, by their terms, confer no authority to revisit sentencing decisions unrelated to the Guidelines amendment on which sentence reduction proceedings are based. Indeed, Guidelines § 1B1.10 specifically directs that district courts, in calculating the amount of reduction authorized by a Guidelines amendment, "shall leave all other guideline application decisions unaffected." Guidelines § 1B1.10(b)(1).[10] Thus, if the district court was

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[10] Petitioner cites (Pet. Br. 47) *United States* v. *Adams*, 104 F.3d 1028 (8th Cir. 1997), for the proposition that Guidelines § 1B1.10 does not "'prohibit' the district court from reconsidering prior decisions." Petitioner's reliance on *Adams* is misplaced for at least two reasons. First, in the passage on which petitioner relies, the Eighth Circuit addressed only whether Section 1B1.10's instruction that "[a]ll other guidelines application decisions remain unaffected," Guidelines § 1B1.10, comment. (n.2) (1995), barred the district court from reconsidering factual findings relevant to the Guidelines amendment at issue. *Adams*, 104 F.3d at 1030. The Eighth Circuit did not hold, as petitioner now urges, that the district court would be free to reconsider Guidelines determinations wholly unrelated to the amendment. Second and in any event, the Eighth Circuit ultimately concluded, based in part on another portion of Section 1B1.10, that even limited reconsideration of factual find-

compelled to reconsider the criminal history category calculation it had made at petitioner's sentencing in 1993, it can only be because *Booker* overrides the limitations embodied in Section 3582(c)(2) and Guidelines § 1B1.10 and requires that district courts be permitted to reopen all aspects of the defendant's sentence in the course of Section 3582(c)(2) sentence-reduction proceedings. For all the reasons explained above, *Booker* does not command that result. See pp. 16-38, *supra*.

3. In any event, petitioner's assignment of error fails even on the terms of his own argument. As noted above, because petitioner did not raise the argument in the district court, it is reviewable only for plain error. Further, as petitioner acknowledges (Pet. Br. 47-48), even if the district court in petitioner's Section 3582(c)(2) proceedings otherwise had authority to consider sentencing issues unrelated to the application of the crack cocaine amendments, the court's calculation of petitioner's criminal history category at his 1993 sentencing is the law of the case. That calculation is therefore not subject to reconsideration unless petitioner can demonstrate that it was "clearly erroneous and would work a manifest injustice." Pet. Br. 48 (quoting *Arizona* v. *California*, 460 U.S. 605, 618 n.8 (1983)).

Petitioner has not demonstrated that his criminal history category was based on error at all, much less an error that should have been obvious to the district court. His argument depends on a factual premise unsupported by the record: that the California court that sentenced petitioner following his resisting arrest conviction in 1990 suspended

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ings directly relevant to the application of the Guidelines amendment would be inappropriate. *Id.* at 1030-1031 ("We think it implicit in [Guidelines § 1B1.10(b) (1995)] that the district court is to leave all of its previous factual decisions intact when deciding whether to apply a guideline retroactively.").

his two-year sentence of probation. See Pet. Br. 40, 41.[11] The record indicates only that imposition of sentence had been suspended and that petitioner had received two years of probation. PSR ¶ 47. The reference to the suspension of imposition of sentence does not, as petitioner suggests, establish that "the probationary portion of [petitioner's] sentence was suspended." Pet. Br. 40, 41. In California, "probation" *is* "the suspension of the imposition or execution of a sentence," accompanied by an "order of conditional and revocable release in the community under the supervision of a probation officer." Cal. Penal Code. § 1203(a). California law empowers trial courts in misdemeanor cases "to suspend the imposing or the execution of the sentence, and to make and enforce the terms of probation for a period not to exceed three years." *Id.* § 1203a.[12]

Petitioner identifies nothing in California law that would permit a court to impose probation and then suspend it.[13]

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[11] Petitioner notes (Pet. Br. 40) that he had been placed in, and successfully completed, a six-month diversion program. Petitioner was placed in that program in connection with a later-dismissed charge for possession of crack cocaine. See PSR ¶ 47. The disposition of the possession charge has no bearing on the district court's treatment of petitioner's conviction for resisting arrest.

[12] Whether the court suspends imposition of sentence or imposes sentence but suspends its execution determines the scope of sentencing options in the event the court subsequently revokes probation. See *People* v. *Wagner*, 201 P.3d 1168, 1174 (Cal. 2009); *People* v. *Howard*, 946 P.2d 828, 830 (Cal. 1997).

[13] In *United States* v. *Mejia*, 559 F.3d 1113 (9th Cir. 2009), on which petitioner relies (Pet. Br. 41), the defendant's probation following his California resisting arrest conviction had not been suspended, but rather was terminated three days after it was imposed. *Mejia*, 559 F.3d at 1115-1116. The record in this case contains no indication that petitioner's probation was terminated before the probation period expired.

And in any event, he offers no persuasive reason to think that such an unorthodox disposition occurred in his case. Thus, even if, as petitioner argues (Pet. Br. 41), assigning a criminal history point based on a suspended two-year period of probation would have been "plainly" or "clearly" erroneous under Guidelines § 4A1.2(c)(1), see *United States* v. *Mejia*, 559 F.3d 1113, 1116 (9th Cir. 2009); but see *United States* v. *Gonzales*, 506 F.3d 940, 950-951 (9th Cir. 2007) (en banc) (Ikuta, J. dissenting), petitioner has not established that any such error occurred here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

2. 18 U.S.C. 3553(a) provides:

Imposition of a sentence

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
>
> (2) the need for the sentence imposed—
>
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
>
> (B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of

whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

3. 18 U.S.C. 3582(c) provides:

Imposition of a sentence of imprisonment

(c) MODIFICATION OF AN IMPOSED TERM OF IMPRISONMENT.—The court may not modify a term of imprisonment once it has been imposed except that—

(1) in any case—

(A) the court, upon motion of the Director of the Bureau of Prisons, may reduce the term of

imprisonment (and may impose a term of probation or supervised release with or without conditions that does not exceed the unserved portion of the original term of imprisonment), after considering the factors set forth in section 3553(a) to the extent that they are applicable, if it finds that—

(i) extraordinary and compelling reasons warrant such a reduction; or

(ii) the defendant is at least 70 years of age, has served at least 30 years in prison, pursuant to a sentence imposed under section 3559(c), for the offense or offenses for which the defendant is currently imprisoned, and a determination has been made by the Director of the Bureau of Prisons that the defendant is not a danger to the safety of any other person or the community, as provided under section 3142(g);

and that such a reduction is consistent with applicable policy statements issued by the Sentencing Commission; and

(B) the court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure; and

(2) in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(*o*), upon motion of the defendant or the Director of the Bureau of Prisons, or on its own motion, the

court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission.

4. 28 U.S.C. 994 provides in pertinent part:

Duties of the Commission

(a) The Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of any Federal statute shall promulgate and distribute to all courts of the United States and to the United States Probation System—

(1) guidelines, as described in this section, for use of a sentencing court in determining the sentence to be imposed in a criminal case, including—

* * * * *

(2) general policy statements regarding application of the guidelines or any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2) of title 18, United States Code, including the appropriate use of—

* * * * *

(C) the sentence modification provisions set forth in sections 3563(c), 3564, 3573, and 3582(c) of title 18;

* * * * *

(*o*) The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the guidelines promulgated pursuant to the provisions of this section. In fulfilling its duties and in exercising its powers, the Commission shall consult with authorities on, and individual and institutional representatives of, various aspects of the Federal criminal justice system. The United States Probation System, the Bureau of Prisons, the Judicial Conference of the United States, the Criminal Division of the United States Department of Justice, and a representative of the Federal Public Defenders shall submit to the Commission any observations, comments, or questions pertinent to the work of the Commission whenever they believe such communication would be useful, and shall, at least annually, submit to the Commission a written report commenting on the operation of the Commission's guidelines, suggesting changes in the guidelines that appear to be warranted, and otherwise assessing the Commission's work.

* * * * *

(u) If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

5. Sentencing Guidelines § 1B1.10 (2008) provides:

Reduction in Term of Imprisonment as a Result of Amended Guideline Range (Policy Statement)

(a) Authority.—

(1) In General.—In a case in which a defendant is serving a term of imprisonment, and the guideline range applicable to that defendant has subsequently been lowered as a result of an amendment to the Guidelines Manual listed in subsection (c) below, the court may reduce the defendant's term of imprisonment as provided by 18 U.S.C. 3582(c)(2). As required by 18 U.S.C. 3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement.

(2) Exclusions.—A reduction in the defendant's term of imprisonment is not consistent with this policy statement and therefore is not authorized under 18 U.S.C. 3582(c)(2) if—

(A) None of the amendments listed in subsection (c) is applicable to the defendant; or

(B) An amendment listed in subsection (c) does not have the effect of lowering the defendant's applicable guideline range.

(3) Limitation.—Consistent with subsection (b), proceedings under 18 U.S.C. 3582(c)(2) and this policy statement do not constitute a full resentencing of the defendant.

(b) Determination of Reduction in Term of Imprisonment.—

(1) In General.—In determining whether, and to what extent, a reduction in the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement is warranted, the court shall determine the amended guideline range that would have been applicable to the defendant if the amendment(s) to the guidelines listed in subsection (c) had been in effect at the time the defendant was sentenced. In making such determination, the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced and shall leave all other guideline application decisions unaffected.

(2) Limitations and Prohibition on Extent of Reduction.—

(A) In General.—Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

(B) Exception.—If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defen-

dant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subdivision (1) of this subsection may be appropriate. However, if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. 3553(a) and United States v. Booker, 543 U.S. 220 (2005), a further reduction generally would not be appropriate.

(C) Prohibition.—In no event may the reduced term of imprisonment be less than the term of imprisonment the defendant has already served.

(c) Covered Amendments.—Amendments covered by this policy statement are listed in Appendix C as follows: 126, 130, 156, 176, 269, 329, 341, 371, 379, 380, 433, 454, 461, 484, 488, 490, 499, 505, 506, 516, 591, 599, 606, 657, 702, 706 as amended by 711, and 715.

Commentary

Application Notes:

1. *Application of Subsection (a).—*

(A) Eligibility.—Eligibility for consideration under 18 U.S.C. 3582(c)(2) is triggered only by an amendment listed in subsection (c) that lowers the applicable guideline range. Accordingly, a reduction in the defendant's term of imprisonment is not authorized under 18 U.S.C. 3582(c)(2) and is not consistent with this policy

statement if: (i) None of the amendments listed in subsection (c) is applicable to the defendant; or (ii) an amendment listed in subsection (c) is applicable to the defendant but the amendment does not have the effect of lowering the defendant's applicable guideline range because of the operation of another guideline or statutory provision (e.g., a statutory mandatory minimum term of imprisonment).

(B) Factors for Consideration.—

(i) In General.—Consistent with 18 U.S.C. 3582(c)(2), the court shall consider the factors set forth in 18 U.S.C. 3553(a) in determining: (I) whether a reduction in the defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(ii) Public Safety Consideration.—The court shall consider the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment in determining: (I) Whether such a reduction is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

(iii) Post-Sentencing Conduct.—The court may consider post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment in determining: (I) Whether a reduction in the

defendant's term of imprisonment is warranted; and (II) the extent of such reduction, but only within the limits described in subsection (b).

2. *Application of Subsection (b)(1).—In determining the amended guideline range under subsection (b)(1), the court shall substitute only the amendments listed in subsection (c) for the corresponding guideline provisions that were applied when the defendant was sentenced. All other guideline application decisions remain unaffected.*

3. *Application of Subsection (b)(2).—Under subsection (b)(2), the amended guideline range determined under subsection (b)(1) and the term of imprisonment already served by the defendant limit the extent to which the court may reduce the defendant's term of imprisonment under 18 U.S.C. 3582(c)(2) and this policy statement. Specifically, if the original term of imprisonment imposed was within the guideline range applicable to the defendant at the time of sentencing, the court shall not reduce the defendant's term of imprisonment to a term that is less than the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1). For example, in a case in which: (A) The guideline range applicable to the defendant at the time of sentencing was 41 to 51 months; (B) the original term of imprisonment imposed was 41 months; and (C) the amended guideline range determined under subsection (b)(1) is 30 to 37 months, the court shall not reduce the defendant's term of imprisonment to a term less than 30 months.*

If the original term of imprisonment imposed was less than the term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing, a reduction comparably less than the amended guideline range determined under subsection (b)(1) may be appropriate. For example, in a case in which: (A) The guideline range applicable to the defendant at the time of sentencing was 70 to 87 months; (B) the defendant's original term of imprisonment imposed was 56 months (representing a downward departure of 20 percent below the minimum term of imprisonment provided by the guideline range applicable to the defendant at the time of sentencing); and (C) the amended guideline range determined under subsection (b)(1) is 57 to 71 months, a reduction to a term of imprisonment of 46 months (representing a reduction of approximately 20 percent below the minimum term of imprisonment provided by the amended guideline range determined under subsection (b)(1)) would amount to a comparable reduction and may be appropriate.

In no case, however, shall the term of imprisonment be reduced below time served. Subject to these limitations, the sentencing court has the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section.

4. Supervised Release.—

(A) Exclusion Relating to Revocation.—Only a term of imprisonment imposed as part of the original sentence is authorized to be reduced under this section. This section does not au-

thorize a reduction in the term of imprisonment imposed upon revocation of supervised release.

(B) Modification Relating to Early Termination.—If the prohibition in subsection (b)(2)(C) relating to time already served precludes a reduction in the term of imprisonment to the extent the court determines otherwise would have been appropriate as a result of the amended guideline range determined under subsection (b)(1), the court may consider any such reduction that it was unable to grant in connection with any motion for early termination of a term of supervised release under 18 U.S.C. 3583(e)(1). However, the fact that a defendant may have served a longer term of imprisonment than the court determines would have been appropriate in view of the amended guideline range determined under subsection (b)(1) shall not, without more, provide a basis for early termination of supervised release. Rather, the court should take into account the totality of circumstances relevant to a decision to terminate supervised release, including the term of supervised release that would have been appropriate in connection with a sentence under the amended guideline range determined under subsection (b)(1).

Background: Section 3582(c)(2) of Title 18, United States Code, provides: "[I]n the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. 994(o), upon motion of the defendant or the Director of

the Bureau of Prisons, or on its own motion, the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

This policy statement provides guidance and limitations for a court when considering a motion under 18 U.S.C. 3582(c)(2) and implements 28 U.S.C. 994(u), which provides: "If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced."

Among the factors considered by the Commission in selecting the amendments included in subsection (c) were the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range under subsection (b)(1).

The listing of an amendment in subsection (c) reflects policy determinations by the Commission that a reduced guideline range is sufficient to achieve the purposes of sentencing and that, in the sound discretion of the court, a reduction in the term of imprisonment may be appropriate for previously sentenced, qualified defendants. The authorization of such a discretionary reduction does not otherwise affect the lawfulness of a previously imposed sentence, does not authorize a reduction in any other component of the sentence, and

does not entitle a defendant to a reduced term of imprisonment as a matter of right.

The Commission has not included in this policy statement amendments that generally reduce the maximum of the guideline range by less than six months. This criterion is in accord with the legislative history of 28 U.S.C. 994(u) (formerly section 994(t)), which states: "It should be noted that the Committee does not expect that the Commission will recommend adjusting existing sentences under the provision when guidelines are simply refined in a way that might cause isolated instances of existing sentences falling above the old guidelines or when there is only a minor downward adjustment in the guidelines. The Committee does not believe the courts should be burdened with adjustments in these cases." S. Rep. 225, 98th Cong., 1st Sess. 180 (1983).*

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* So in original. Probably should be "to fall above the amended guidelines".

REPLY BRIEF

Supreme Court, U.S.
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In The Supreme Court of the United States

PERCY DILLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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I. COURTS MUST CONDUCT ALL SENTENCINGS IN ACCORDANCE WITH *BOOKER*'S CONSTITUTIONAL AND REMEDIAL HOLDINGS, AND MAY DO SO AND STILL RESPECT THE SENTENCING COMMISSION'S IMPORTANT FUNCTION.

The government's vision of a Section 3582(c) resentencing strikingly resembles the mandatory Guidelines system dismantled in *Booker*, which prevented courts from honoring the Sixth Amendment's jury trial guarantee and the directive in 18 U.S.C. §3553(a) to "impose a sentence sufficient, but not greater than necessary to accomplish the goals of sentencing." 18 U.S.C. §§3553(a), (b)(1) (abrogated). It urges this Court to hold that the Guidelines still mandate courts resentencing under 18 U.S.C. §3582(c)(2) to impose a sentence within the Guidelines range – even if the sentence imposed exceeds the maximum penalty authorized under the Sixth Amendment and is longer than needed to serve the statutory goals of sentencing. The government claims its proposed rule can be reconciled with this Court's decision in *Booker*, arguing that resentencings under §3582(c)(2) do not constitute "*de novo* sentencing[s] under §3553(a)," (Br. 13) and are, therefore, uniquely subject to the Commission edicts and insulated from this Court's constitutional commands. Both statute and policy, according to the government, require this anomaly.

The government is wrong. Whether Section 3582(c)(2) proceedings are labeled "sentencings,"

"*de novo* sentencings" "resentencings" or "sentence reduction proceedings," (See, e.g., Br. 6, 10, 12-15, 23, 25-30, 35-38) the government fails to develop a meaningful Sixth Amendment distinction between a Section 3582(c)(2) resentencing and other resentencings – like those following limited remand – at which *Booker* applies.

The government's arguments ignore that the Guidelines, and the judgments of the Sentencing Commission that they embody, are now subordinate to §3353(a)'s "overarching statutory directive." *Kimbrough v. United States*, 552 U.S. 85, 101 (2007). Nothing in §3582 or elsewhere in the Sentencing Reform Act (SRA) alters this fact. And, even if there were a clear statutory requirement that district courts impose Guidelines sentences in Section 3582(c)(2) resentencings, it could not survive under the Sixth Amendment. *See Booker*, 543 U.S. 220, 259 (2005) (severing and excising §3553(b)(1), which expressly "requires sentencing courts to impose a sentence with the applicable Guidelines range (in the absence of circumstances that justify a departure)"). Nor can a Guidelines policy statement – even if given the legal force of a statute, as the government urges here – abrogate this Court's interpretation of what the Constitution requires. *See Dickerson v. United States*, 530 U.S. 428, 437 (2000) ("But Congress may not legislatively supersede our decisions interpreting and applying the Constitution.").

The government envisions a judicial proceeding at which the Guidelines still require the court to impose a sentence that exceeds the statutory maximum penalty allowed for the offense of conviction and is greater than necessary to satisfy the purposes of sentencing. This Court must reject the invitation to carve out a category of sentencing proceedings at which neither the Sixth Amendment nor ordinary jurisprudential principles apply.

A. For *Booker* Purposes, Section 3582(c)(2) Proceedings Function Just Like Any Other Sentencing, And The Government's Distinction Between Plenary And Other Resentencing Is Not Only Fictional, But Flawed.

This Court granted *certiorari* to decide "[w]hether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. §3582?" *Dillon v. United States*, 130 S. Ct. 797 (2009). The government contends that the formulation of this question "misapprehends the nature of Section 3582(c) sentence-reduction proceedings" (Br. 13) because a district court does not impose "a 'new sentence' under 18 U.S.C. §3553(a), as it would at an initial or plenary resentencing." (Br. 26).

This Court's decision in *Booker*, finding the federal sentencing Guidelines unconstitutional and rendering them advisory, 543 U.S. at 259, did not limit

application of its holdings to a particular type of sentencing proceeding, and no such limitation flows from *Booker* or this Court's post-*Booker* jurisprudence. Despite the government's *labels*, Section 3582(c) resentencings *function*, in all ways relevant to the Sixth Amendment, like any other resentencing. Section 3582(c) proceedings invoke the power of an Article III judge, involve the application of the Section 3553(a) factors, and replace a previously-imposed sentence with a new one that results in a final appealable judgment. Like all sentencings, they must therefore comport with the Sixth Amendment.

1. The limits on courts imposing new sentences under Section 3582(c)(2) are analogous to those which apply following limited appellate remands, at which the government concedes *Booker* applies.

The government does not dispute that courts imposing reduced sentences under §3582(c)(2) must consider the Guidelines and the other factors set forth in §3553(a), just as courts at initial sentencings and resentencings following an unlimited remand must do. Nor does it dispute that a sentence imposed under §3582(c)(2), like any other sentence imposed under §3553(a), results in a new judgment that is reviewable under §3742. (Gov't C.A. Br. 2.) It also acknowledges that "[w]hen a court resentences a defendant because of an error in an earlier-imposed sentence, the court must impose a 'new sentence' to replace one

that has been vacated or set aside," (Br. 28 (quoting *United States v. Arrous*, 320 F.3d 355, 359 (2d Cir. 2003)) and that the new sentence must comport with current law (id. (citing *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987))).

The government draws a distinction between so-called "plenary" sentencings or resentencings and Section 3582 proceedings on the fact that, at a Section 3582 resentencing, the court cannot *increase* a defendant's prior sentence based on the Section 3553(a) factors or modify other components of the sentence, such as the term of supervised release, fines, or restitution. (Br. 26.) But, this does not transform the Section 3582(c)(2) proceeding into something different than a resentencing, or the resulting sentence into anything other than a new sentence. To the contrary, as the government correctly acknowledged in *United States v. Cothran*, 106 F.3d 1560 (11th Cir. 1997), a Section 3582(c)(2) resentencing is analogous to a limited remand. *Id.* at 1562 (noting government's argument that a Section 3582(c) resentencing is "merely a form of limited remand").

At resentencing following a limited remand, a district court might also lack the authority to increase a defendant's sentence or to modify any aspect of the original sentence. *See, e.g.*, *United States v. Orlando*, 363 F.3d 596, 602 (6th Cir. 2004) (district court lacked the authority to review defendant's sentence *de novo* where remand was limited); *United States v. Kim*, 114 F.3d 1192 (7th Cir. 1997) (unpublished) (no increase in sentence or change in

restitution permitted). And, by definition, a limited remand does not authorize "plenary resentencing." (See, e.g., Br. 23, 26, 30.) However, as the government agrees, *Booker* would nevertheless apply. (Br. 28-29 (citing 18 U.S.C. §3742(g) and noting its requirement that courts resentencing following remand to "resentence in accordance with §3553 and with such instructions as may have been given by the court of appeals."))[1]

The government suggests that when a sentence is reopened for any reason other than a court finding of error, finality precludes application of current law unless that law is retroactively applicable. (Br. 23-24, 28.) Mr. Dillon agrees that "[o]nce a district court has pronounced sentence and the sentence becomes final, the court may not alter that sentence except as

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[1] The government's only explanation for why Section 3582(c)(2)'s reference to §3553(a) does not carry the same significance as Section 3742(g)'s reference to §3553 is that "Section 3582(c)(2) does not direct the court to evaluate, as an original matter, whether the defendant's sentence of imprisonment comports with the 3553(a) factors." (Br. 29.) Section 3582, however, does not limit consideration of the §3553(a) factors to the determination where within the amended Guidelines range to sentence, as the government would have it. (Br. 28-29.) Instead, as discussed, see pp. 21-27, *infra*, the statutory command to courts to consider the Section 3553(a) factors "to the extent that they are applicable," is only properly interpreted as meaning to the extent they apply under the facts and circumstances of the particular case, as the government appears to acknowledge. (See Br. 34-35 (stating that if USSG §1B1.10 were not "binding," courts would consider "the Section 3553(a) factors" to the extent that they are applicable "from case to case."))

Congress allows." (Br. 18 (citations omitted).) Here, however, Congress provided for alteration through §3582(c)(2). *Booker*'s remedy applies at a Section 3582(c)(2) resentencing, not because such proceedings mandate application of "all subsequent legal developments" (Br. 38) but because the Sixth Amendment requires an advisory Guidelines system at all sentencings to ensure that judicial fact finding does not result in a sentence above that authorized by a guilty plea or jury verdict.

The government does not persuasively explain how it can meaningfully distinguish a sentence reopened under §3582(c) from other resentencings for purposes of determining whether the new sentence must comport with the Sixth Amendment and *Booker*'s remedial opinion. (Br. 28.) The distinction does not appear to rest on the concept of finality. Indeed, with its repeated characterizations of Mr. Dillon's sentence as "otherwise final" instead of final (Br. 14, 23, 28, 29 n.7) and its acknowledgement that §3582(c)(2) represents an "exception to the general rule of finality of criminal sentences" (Br. 17, 23) the government appears at times to concede that finality does not provide a legal basis for limiting application of *Booker*.

This concession is a necessary one. Any rule that forbids *Booker*'s application at Section 3582(c)(2) proceedings would strain the concept of finality and stretch non-retroactivity beyond its natural limits. The original sentence cannot, at the same time, be final, reopened, and replaced with a new sentence

and final appealable judgment. No formulation of the non-retroactivity doctrine requires courts to engage in time travel. *See United States v. Jones*, 606 F.Supp.2d 1293, 1284 (D. Colo. 2009) (noting that Tenth Circuit's ruling that *Booker* is inapplicable at Section 3582(c)(2) proceedings "force[s] courts to engage in the legal fiction of going back, in a post-*Booker* world, to a pre-*Booker* time to 'substitute' a new Guideline"). Where, as here, a new sentence is imposed, finality and retroactivity are not at issue.[2]

The government accuses Mr. Dillon of seeking to "convert Section 3582(c)(2) from a limited exception to the general rule of finality of criminal sentences into a broad vehicle for revisiting criminal sentences whenever the Commission elects to make a particular Guidelines amendment retroactively applicable" (Br. 17) and claims that "Congress did not empower the Commission to license courts to engage in wholesale, plenary resentencings" (Br. 23) or to "permit broadly reopening [] sentences." (Br. 36.) Setting aside *Booker* and the Sixth Amendment, this attempt to recast Section 3582(c)(2) proceedings does not accord

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[2] The Commission mischaracterizes Mr. Dillon's argument that *Booker* applies at Section 3582(c)(2) resentencings as a challenge to his original sentence. (USSC Br. 19-20.) Mr. Dillon does not seek to rely on *Booker* to challenge his original sentence of 322 months' imprisonment – an attack that would require retroactive application of *Booker*. He argues that his new sentence of 270 months' imprisonment, imposed on June 11, 2008, after *Booker* was decided, is unconstitutional.

with the history of the statute or the Guidelines policy statement involved in this case.

In fact, the Guidelines in effect when the district court first sentenced Mr. Dillon in November 1993 expressly provided for *de novo* resentencings at Section 3582(c)(2) proceedings. *See* USSG §1B1.10 & comment. (n.1) (1993) ("the amended guideline range . . . is to be determined by applying all amendments to the guidelines (i.e., as if the defendant was being sentenced under the guidelines currently in effect))." A Section 3582(c)(2) resentencing conducted pursuant to that version of USSG §1B1.10 constituted a complete "do-over of an original proceeding." (USSC Br. 20.) It defies understanding how the government and the Commission could now claim that "broadly reopening" sentences under §3582(c)(2) is not permissible.[3]

Mr. Dillon, however, has not argued that Section 3582(c)(2) proceedings constitute *de novo* resentencings; nor is he seeking to transform §3582(c) into a "mechanism for incorporating all subsequent legal developments into the sentence." (Br. 28.) He seeks only a ruling that would require courts resentencing under §3582(c) to comply with the Sixth Amendment and that would allow them to revisit prior decisions

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[3] The prior version of USSG §1B1.10 is the best available evidence of the Commission's understanding of the congressionally permitted breadth of a Section 3582(c)(2) proceeding. The Court should reject its efforts to retreat from its previous understanding. (USSC Br. 18-21.)

when a defendant is able to meet the requirements of a well-recognized exception to the law-of-the-case doctrine. (See Pet. Br. 21-31; 46-49.)[4] Nothing in SRA demands a contrary decision.

2. Because a new sentence is being imposed, the same procedural protections should apply at a Section 3582(c)(2) sentencing as at any other sentencing.

As another basis for classifying §3582(c)(2) resentencings as unique proceedings, the government points to Federal Rule of Criminal Procedure 43. (Br. 25-27 (citing Fed. R. Crim. P. 43(b)(4).) It argues that, because the rule does not require a defendant to be present at Section 3582(c)(2) resentencings, the proceedings are not of the type at which *Booker* should apply. Rule 43, however, offers little support to the government's position. First, it is silent on the proposition for which it is cited – a defendant's *right* to be present at Section 3582(c)(2) proceedings. *See* Fed. R. Crim. P. 43(b)(4) (providing only that a defendant "need not be present"). Second, and more importantly, when Rule 43 was amended in 1998 to obviate the need for a defendant's presence, Section 3582(c)(2) proceedings were vastly different from the

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[4] More fundamentally, the government's mischaracterization of Mr. Dillon's position as unduly broad ignores the sweeping implications of its own proposition that courts imposing sentence under §3582(c)(2) can ignore the Constitution.

proceedings contemplated under the current version of USSG §1B1.10.

Under the current version, district courts must consider new facts and arguments and make findings of fact. The Fifth Circuit has recognized the difference, in addressing whether defendants should be provided counsel at 3582 hearings. *United States v. Robinson*, 542 F.3d 1045 (5th Cir. 2008). As that court noted, "[t]he question [] of whether a §3582(c)(2) motion triggers either a statutory or constitutional right to an attorney – in either this court or the district court – is a different question now than it was before the amendments to USSG §1B1.10(b)." *Robinson*, 542 F.3d at 1052 (finding *United States v. Whitebird*, 55 F.3d 1007 (5th Cir. 1995), no longer controlling in light of substantial revisions to USSG §1B1.10). The court explained that "[w]hile previous courts had to determine what sentence they would have given the defendant in light of the facts as they existed at the time of the original sentencing, the new process requires district courts when answering this question to consider, in every case, 'the nature and seriousness of the danger to any person or the community that may be posed by a reduction in the defendant's term of imprisonment' and allows district courts to consider 'post-sentencing conduct of the defendant that occurred after imposition of the original term of imprisonment.'" *Id.*

Neither Rule 43, nor the cases cited by the government, resolve the issue of whether, under the current version of USSG §1B1.10, a defendant has a

right to be present and/or a right to counsel at a Section 3582(c)(2) resentencing, as the government would have it.[5] Notably, however, the overwhelming majority of courts to confront resentencing under the current version of USSG §1B1.10 decided to appoint counsel in Section 3582(c)(2) proceedings. Indeed, in most every district, a standing order provided for

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[5] Under this new structure, a defendant must have the right to be present under the Sixth Amendment and the Due Process Clause, which guarantee the right to be present at all stages of the criminal process "where his absence might frustrate the fairness of the proceedings." *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975); *see Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934) (concerning defendant's due process right to be present). It seems equally apparent that "where substantial rights of a criminal accused may be affected," counsel is needed to "marshal[ ] the facts, introduce[e] evidence of mitigating circumstances and in general aid[ ] and assist[ ] the defendant to present his case as to sentence. . . ." *Mempha v. Rhay*, 398 U.S. 128, 257 (1967).

In Section 3582(c) proceedings, counsel is necessary to assist in calculating the revised guideline range, to marshal facts and evidence in mitigation of sentence, counter any evidence or argument that public safety or post-sentence conduct should result in a sentence higher than justified under §3553(a). Indeed, these factors were relied upon by the government to challenge, or by courts to deny, Section 3582(c)(2) reductions in numerous cases. *See* http://www.fd.org/odstb_dillon_orders.htm (collecting Section 3582(c)(2) cases involving additional fact finding). Even under the limited range of sentencing options envisioned under USSG §1B1.10, the decisions required by the district court, insofar as they affect the length of imprisonment, have Sixth Amendment significance. *See Glover v. United States*, 531 U.S. 198, 203 (2001) ("[A]ny amount of actual jail time has Sixth Amendment significance").

appointment of counsel at all Section 3582(c)(2) resentencings.[6]

B. In Imposing New Sentences Under Section 3582(c)(2), Courts Must Treat The Sentencing Guidelines As Advisory To Avoid Violating *Booker*'s Sixth Amendment And Remedial Holdings.

Under the advisory Guidelines system announced in *Booker*, "judges [are] no longer . . . tied to the sentencing range indicated in the Guidelines, but they [are] obliged to 'take account of' that range along with the other sentencing goals Congress enumerated in the SRA at 18 U.S.C. §3553(a)." *Cunningham v. California*, 549 U.S. 270, 286-87 (2007). The Government has offered no compelling reason why a single Guidelines policy statement could, in the wake of *Booker* and this Court's post-*Booker* jurisprudence, bind district courts and require them to impose a sentence within a mandatory Guidelines range irrespective of the Sixth Amendment and the statutory goals of sentencing set forth in §3553(a). As one court noted, "it would, to say no more, be ironic, if the relief available to a defendant who received a sentence that is now recognized to be unconstitutional because imposed under mandatory guidelines based on non-jury fact findings and unwise because the guideline

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[6] Orders appointing counsel are collected and available at http://www.fd.org/odstb_Orders_Appointing_Counsel.htm.

under which he was sentenced was excessively severe, can be limited by a still-mandatory guideline." *United States v. Polanco*, 2008 WL 14825 *3 (S.D.N.Y. Jan. 15, 2008).

1. Treating Section 1B1.10 as mandatory in Section 3582(c)(2) sentencings violates the Sixth Amendment because it requires calculation of a new Guidelines range based on judicially determined facts that increase the sentence above the statutory maximum.

The government attempts to escape the fact that the sentence imposed by the district court at Mr. Dillon's resentencing exceeds the sentence authorized by the jury's verdict by arguing that "[a]ny 'constitutional infirmities' that may inhere in the sentence are 'features of earlier sentencing decisions,'" and not of the district court's sentence under §3582(c)(2). (Br. 30 (quoting *United States v. Lafayette*, 585 F.3d 435, 438 (D.C. Cir. 2009).) The government's reliance on *Lafayette* is misplaced. In *Lafayette*, the district court denied the request for a sentence reduction, "so [the] sentence [was] not based on any new [Guidelines] calculation at all." *Lafayette*, 585 F.3d at 438-39. The court therefore found that the defendant was "seeking to challenge a Guidelines determination made years ago." *Id.* at 439. Whether the constitutional infirmities of the original sentence inure when a court denies a Section 3582(c)(2) motion – the issue before

the court in *Lafayette* – differs from the question presented here, where the court granted a reduction in Mr. Dillon's sentence. As the court in *Lafayette* recognized, reducing a sentence under §3582(c)(2) "requires a new Guidelines calculation, and it is that calculation, not the calculation at the original sentence, that raises a *Booker* problem." *Id.* at 438.

The law does not support the government's claim that USSG §1B1.10 "simply instructs district courts how to calculate the scope of the benefit a retroactive Guidelines amendment offers a particular defendant," and does not require calculation of a new, mandatory Guidelines range. (Br. 21); *see* USSG §1B1.10(b)(1) & comment. (n.2). Not only does the very case the government cites recognize that resentencing under §3582(c)(2) "requires a new Guidelines calculation," *Lafayette*, 585 F.3d at 438, but other courts to confront the issue directly have reached the same conclusion. *See, e.g.*, *United States v. Melvin*, 556 F.3d 1190, 1192 (11th Cir. 2009); *United States v. Dunphy*, 551 F.3d 247, 251 (4th Cir. 2009).

The Guidelines calculation method selected and outlined in USSG §1B1.10(b)(1) does not present the constitutional problem here. (Br. 31 (quoting §994(u).) The critical question under *Booker* and the Sixth Amendment is whether courts treat the Commission's requirement that courts sentence within the amended Guidelines range, *see* §1B1.10(b)(2)(A), as mandatory or as advisory. Where, as here, the court calculated a new Guidelines range that was based on judicially determined facts that increased Mr. Dillon's sentence

above the maximum sentence allowed under the jury's verdict, treating that range as mandatory violated the Sixth Amendment under *Booker*.

2. Section 3582(c)(2) is subject to *Booker*'s remedial opinion because it cannot function independently of the Guidelines and Section 3553(a).

That *Booker* did not excise or mention §3582(c)(2) cannot support the government's argument. As Mr. Dillon has argued, the statute was not before the Court in *Booker*. (Pet. Br. 31-38.) And, the Court's statement in *Booker* that "the remainder of the Act "functions independently," *Booker*, 543 U.S. at 259 (quoting *Alaska Airlines, Inc. v. Brock*, 480 U.S. 678, 684 (1987)), did not, as the government suggests (Br. 32) render all remaining provisions of the SRA constitutional. *See Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 703 (1991) (noting the hermeneutical risks inherent in textual silence because "of the dubious reliability of inferring specific intent from silence"). Indeed, as the government has recognized, other statutory provisions not mentioned or excised by *Booker* nevertheless were affected by its holdings. *See, e.g., United States v. Hecht*, 470 F.3d 177, 182 (4th Cir. 2006) (government conceded §3553(b)(2) violates the rationale of *Booker* and "requires the same remedy-excising and severing").

In any event, the principal statutory provisions at issue here – Sections 994(o), 994(u) and 3582(c)(2) – do not function independently from the severed provisions. As the government recognizes, Section 3582(c)(2) proceedings involve the Commission's "'revised' judgment about the appropriate Guidelines range" (Br. 23 (quoting 28 U.S.C. §994(o)).) The Commission's revised judgments are not, in any meaningful way, independent from its original judgments about Guidelines offense levels and sentencing ranges. Nevertheless, the government proposes a system in which the Commission's Guidelines amendments, promulgated and made retroactive pursuant to §§994(o) and (u), would bind courts even though the Guidelines it promulgates in the first instance under §§994(a) and (b)(1) now serve only to advise them. This approach extends beyond simple "asymmetry," (Br. 33) and is as "laden with 'administrative complexities' and unlikely to promote [Congress'] basic objective of uniformity," (Br. 33 (quoting *Booker*, 543 U.S. at 266)) as the regime proposed by the government and rejected in *Booker*. *See Booker*, 543 U.S. at 266.

3. The government's policy arguments also must fail, both as a matter of common sense, and because policy arguments can never trump the Constitution.

The government advances several policy arguments why *Booker* should not apply in Section 3582

proceedings. Even if policy concerns could trump the Constitution, the government's arguments nevertheless fail.

The government's primary contention is that requiring district courts to comply with *Booker* in Section 3582 resentencings would create an undue burden on, and administrative difficulties for, the courts.[7] (Br. 36-37) However, as the numerous contested hearings and appeals in every district and circuit evidence, the amendments to USSG §1B1.10

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[7] In a related argument, the government and its *amicus* suggest that application of *Booker* would interfere with the Commission's ability to make an informed decision about whether amendments should be made retroactive, and that USSG §1B1.10(b)(2)(A) was necessary to preserve that ability. (Br. 36-37; USSC Br. 18-21.) They fail to explain, however, how the possibility of earlier release dates for some prisoners could add to the courts' burdens, and fail to acknowledge the additional burdens §1B1.10(b)(2)(A) itself created. And, although the Commission implies that USSG §1B1.10(b)(2)(A) helped it accurately predict the number of eligible prisoners (USSC Br. 19, 21) that number is unaffected by USSG §1B1.10's limitations on the extent to which their terms of imprisonment may ultimately be reduced. USSG §1B1.10, comment. (n.1); §3582(c)(2). And, to the extent it is relevant to a potential burden on probation or law enforcement officers, thousands of releases have taken place as a result of the retroactive crack amendment without the need for additional resources. *See* Statement of Hon. Julia S. Gibbons, Chair, Committee on the Budget of the Judicial Conference of the United States, Before the Subcommittee on Financial Services and General Government of the Committee on Appropriations of the U.S. House of Representatives at 9 (Mar. 19, 2009), available at http://www.uscourts.gov/Press_Releases/2009/Gibbons2010HouseFinal.pdf.

requiring new fact finding created, rather than relieved, administrative burdens and legal complexities. And, although the government claims that the effects on the criminal justice system from the application of *Booker* at Section 3582(c)(2) resentencings would be "significant," (Br. 36) it does not specifically identify any additional burdens that would result from such a rule. (See Br. 36-37.) It points only to the more than 23,000 motions filed as if the number, itself, establishes an inevitable burden. (Br. 36). In this regard, its arguments against application of *Booker* mirror those it offered in an effort to defeat retroactive application of the crack amendment in the first instance. Testimony of Gretchen C. F. Shappert, United States Attorney for the Western District of North Carolina, Before the United States Sentencing Commission at 100-101, 106, 110-13 (Nov. 13, 2007).[8]

The government also contends that uniformity will be sacrificed if this Court accepts Mr. Dillon's argument. But, maintaining a mandatory Guidelines sentencing system for Section 3582(c)(2) proceedings does not serve Congress's objective of uniformity; rather, it invites disparity among defendants whose sentences are based on the Commission's revised judgments. The government's focus on other defendants sentenced under the mandatory Guidelines regime,

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[8] Available at http://www.ussc.gov/hearings/11_13_07/Transcript 111307.pdf.

who will not have the opportunity for application of *Booker*, is misplaced. Unlike Mr. Dillon's, their sentences are final, and no statutory authority authorizes a court to reopen those previously imposed sentences. The only apt comparison here is to other defendants whose sentences were imposed after *Booker*, as the "[t]he fact is, that when [Mr. Dillon] was sentenced, *Booker* had already been decided, and that is all that matters." *United States v. Butler*, 139 F. App'x 510, 512, 2005 WL 1655028 at *2 (4th Cir. 2005) (*per curiam*). When compared with those defendants, uniformity demands that Section 3582(c)(2) resentencings be conducted under *Booker*'s advisory Guidelines regime.

In sum, even if concerns about administrative burdens could prevent courts from complying with the Constitution, which they cannot, any additional work required "to address a fundamental unfairness and to provide the relief . . . to those who are deserving," is "sufficient[ly] justif[ied]." Testimony of the Honorable Reggie B. Walton, United States District Judge for the District of Columbia, Before the United States Sentencing Commission at 30 (Nov. 13, 2007).[9]

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[9] Available at http://www.ussc.gov/hearings/11_13_07/Transcript_111307.pdf.

C. Petitioner's Interpretation Of The Relevant Statutes Honors Both The Gatekeeping Role Of The Commission And The Discretion Of The Courts As Set Forth In The Text.

Mr. Dillon and his *amici* have provided an interpretation of the four statutes at issue here – 18 U.S.C. §3582(c)(2), and 28 U.S.C. §§994(a)(2)(C), 994(o) and 994(u) – that is grounded in the text, that preserves the Commission's role in determining whether and to what extent its guideline amendments will have retroactive effect, and that preserves the courts' discretion in deciding whether and to what extent to reduce the term of imprisonment in light of all of the factors set forth in §3553(a) and the Commission's necessarily non-binding policy statements. (Pet. Br. 35 n.18; Fed. Defenders Br. 10-39.)

Although the government appears to concede at times that §994(u) authorizes the Commission only to decide whether and to what extent its amendments will be given retroactive effect (Br. 19, 22) it also contends that §994(u) authorizes the Commission to "direct" the courts to "treat the Guidelines as 'binding' for the purpose of calculating the scope of the benefit" that would otherwise result from consideration of all of the factors set forth in §3553(a). (Br. 34-35.) The premise of this contention, that congressional directives to the Commission are binding on sentencing courts, is incorrect, as the government has argued

elsewhere.[10] Sentencing courts must follow the Commission's instructions only when a statute that is *directed to the courts* requires.[11] Congress directed §994(u) to the Commission and §3582(c) to the courts. Had it intended for §994(u) to operate as a limit on the courts' consideration of the factors set forth in §3553(a) in Section 3582(c)(2) proceedings, it could easily have done so by stating, for example, that "a court may reduce the term of imprisonment after considering the factors set forth in section 3553(a) to the extent that they are applicable, *but only as specified by the Sentencing Commission pursuant to 28 U.S.C. §994(u).*"

Instead, Congress chose the phrase, "if such a reduction is consistent with applicable policy statements

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[10] *See* Brief of the United States at 9, *Vazquez v. United States*, No. 09-5370 (U.S. Nov. 16, 2009); *Vazquez v. United States*, No. 09-5370, 78 U.S.L.W. 3416 (Jan. 19, 2010) (granting *certiorari*, vacating the judgment, and remanding for further consideration in light of the government's position).

[11] *See, e.g.*, *Neal v. United States*, 516 U.S. 284, 296 (1996) ("§841(b)(1) directs a sentencing court to take into account the actual weight . . . even though the Sentencing Guidelines require a different methodology"); *Kimbrough*, 552 U.S. at 102-03 (rejecting argument that sentencing courts must apply 100-to-1 ratio, because "[t]he statute says nothing about the appropriate sentences within these [minimum and maximum] brackets, and we decline to read any implicit directive into that congressional silence."); *United States v. Michael*, 576 F.3d 323, 328 (6th Cir. 2009) ("By its terms, [§994(h)] tells the Sentencing Commission, not the courts, what to do."); *United States v. Sanchez*, 517 F.3d 651, 663 (2d Cir. 2008) ("Section 994(h) . . . by its terms, is a direction to the Sentencing Commission, not to the courts.").

issued by the Sentencing Commission." §3582(c)(2). The government and its *amicus* acknowledge that these "applicable policy statements" were authorized by §994(a)(2)(C), which directs the Commission to promulgate "policy statements regarding" the "sentence modification provisions set forth in [§]3582(c)." (Br. 3, 20; USSC Br. 13.) And, the government's *amicus* acknowledges, as it must, (see Fed. Defenders Br. 22-39) that §994(a)(2)(C) does not authorize binding policy statements. (USSC Br. 13.)[12] Nevertheless, they argue that a §994(a)(2)(C) policy statement – USSG §1B1.10 – is binding on courts in resentencing under §3582(c)(2). The government and its *amicus* do not explain why Congress chose the phrase "consistent with applicable policy statements" issued pursuant to 28 U.S.C. §994(a)(2)(C), if it meant only as specified by the Commission pursuant to §994(u).

Even though §3582(c)(2), the only relevant statute directed to the courts, does not mention §994(u), the Commission's duty and authority under §994(u) are not "pointless." (USSC Br. 12.) Courts deciding whether they have the power to act on a Section 3582(c)(2) motion must look to the Commission's specifications under §994(u) to determine "whether and to what extent its amendments reducing sentences will be given retroactive effect." *Braxton v. United States*,

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[12] *See also* USSC Br. 14 (arguing that because §1B1.10 "is a policy statement, rather than a Guideline, notice-and-comment procedures were not required").

500 U.S. 344, 348 (1991).[13] The Commission therefore exercises an important gatekeeping role, ensuring that courts do not give retroactive effect to every amendment lowering offense Guidelines ranges. (See Fed. Defenders Br. 14-22.) In addition, the Commission provides the amended advisory Guidelines range, which is "the starting point and initial benchmark" at all sentencing proceedings. *Gall v. United States*, 552 U.S. 38, 49 (2007). These roles – gatekeeping and advising the courts regarding Guidelines ranges – fall directly into the Commission's areas of expertise. *See* 18 U.S.C. §994(o), (u); *Kimbrough v. United States*, 552 U.S. 85, 108-09 (2007); *Gall*, 552 U.S. at 46; *Rita v. United States*, 551 U.S. 338, 350 (2007).

The government and the Commission claim that the 2008 amendments to USSG §1B1.10, were necessary to prevent application of *Booker* and to carry out the Commission's duty under §994(u) to control "by what amount" a sentence should be reduced. (Br. 35.) However, the Commission fully complied with its responsibilities under §994(u) when it reduced base offense levels for crack cocaine offenses by two, and made the two-level reduction retroactive. *See* §§994(o), (u). Deciding when the Sixth Amendment should apply and whether courts may give full effect to all of

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[13] The Commission is directed to "establish a sentencing range [for] each category of offense involving each category of defendant." §994(b)(1). Under §3582(c)(2), a court has the power to act on a motion when a "sentencing range . . . has subsequently been lowered . . . pursuant to 28 U.S.C. §994(o)."

the factors set forth in §3553(a), *see* USSG §1B1.10, exceeds the Commission's authority under §994(u).

D. Even Before *Booker*, The "Consistent With" Phrase In Section 3582(c)(2) Did Not Transform A Non-Binding Policy Statement Into A Binding Rule.

The government and its *amicus* contend that the "consistent with" phrase in the last clause of §3582(c)(2) transforms the "applicable policy statements" referenced there into binding rules. (Br. 20, 21; USSC Br. 13.) The government's *amicus* argues that "[t]he binding nature of §1B1.10 . . . comes not from §994(a)(2), but from §3582(c)(2) itself." (USSC Br. 13.) According to the Commission, "[Section] 3582(c)(2) is unique in expressly requiring a court to act 'consistent with' those policy statements." (Id.) The instruction to courts to act consistently with the Commission's policy statements is not, however, unique to §3582(c)(2). What is different here is the claim that that this phrase transforms a non-binding policy statement into a binding rule. (See Fed. Defenders Br. 33-35.)

Indeed, three of the other statutes listed in §994(a)(2)(A)-(F) expressly call for action in consideration of §3553(a) and "consistent with" the Commission's "policy statements." *See* 18 U.S.C. §§3582(c)(1), 3582(c)(2), 3583(d), 3622; *see* 28 U.S.C. §§994(a)(2)(B), (C), (F). The Commission has issued policy statements for two of them – conditions of supervised release, §3583(d), and reduction in term of imprisonment based on age or other extraordinary and

compelling reasons, §3582(c)(1)(A). The Commission's policy statements regarding conditions of supervised release do not purport to bind or otherwise limit the extent to which the §3553(a) factors may be considered, *see* USSG §§5D1.3(c), (d), (e), p.s., and courts routinely stray from the express terms of these policy statements when related to the factors and purposes set forth in §3553(a).[14]

Courts were always able – indeed, were always mandated – when acting under §3582(c)(2), to consider the §3553(a) factors to the extent that they are applicable in the individual case. To the extent courts imported §3553(b) into §3582(c)(2), there was no textual basis for, but only a habit of, doing so.[15] If, as the government argues (Br. 34-35) *Booker* does remove

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[14] *See, e.g.*, *United States v. Sicher*, 239 F.3d 289 (3d Cir. 2000) ("The fact that a special condition of supervised release is not explicitly authorized by the policy statements of the United States Sentencing Commission does not cause the condition to be inconsistent with the policy statements."); *id.* at 293 ("Courts have regularly approved of special conditions not explicitly contained on this list, so long as those conditions met the general requirements of §3553.") (collecting cases); *see also, e.g.*, *United States v. Dupes*, 513 F.3d 338, 342 (2d Cir. 2008) (same); *United States v. McKissic*, 428 F.3d 719, 723 (7th Cir. 2005) (upholding total ban on alcohol as reasonably related to the §3553(a) factors, though policy statement recommends only "no excessive use").

[15] After *Booker*, several courts appear to have recognized that §3582(c)(2) does not mention §3553(b). *See, e.g.*, *United States v. Blakely*, 2009 WL 174265 **4-5, 11-13 (N.D. Tex. Jan. 23, 2009); *United States v. Jones*, 2008 WL 5101139 *1 (D. Colo. Nov. 25, 2008); *United States v. Ragland*, 568 F.Supp.2d 19, 23, 25, 27 (D.D.C. 2008).

the assumed importation of §3553(b) into Section 3582(c)(2), the Commission cannot now replace it with a "policy statement" intended to operate as its binding equivalent. *See* Part I.B, *supra*.

II. THE COURT SHOULD REMAND MR. DILLON'S GUIDELINES CHALLENGE TO THE DISTRICT COURT WITH INSTRUCTIONS THAT THE COURT HAS JURISDICTION TO CORRECT ANY IDENTIFIED ERROR.

The government does not dispute that district courts should begin all sentencing proceedings by correctly calculating the Guidelines range, and that failing to do so constitutes reversible error. (Br. 38-44.) It claims, however, that, because §3582(c)(2) and USSG §1B1.10 do not authorize district courts to "revisit sentencing decisions unrelated to the Guidelines amendment on which sentence reduction proceedings are based," nothing allowed the court to comply with its duty to begin with a correct Guidelines calculation. (Br. 41.) It also claims that Mr. Dillon failed to object and, therefore, cannot attack the court's criminal history calculation, and that, in any event, he cannot show that the district court "clearly err[ed]." (Br. 40.) The government's arguments, all but one of which are newly-presented, are without merit.[16]

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[16] Insofar as the government reasserts that Section 3582(c)(2) proceedings are not resentencings at which a new

(Continued on following page)

A. Mr. Dillon Preserved A Challenge To The District Court's Criminal History Calculation By Asking The District Court To Revisit Its Prior Criminal History Determination.

The government explicitly acknowledged that Mr. Dillon's claim "was preserved" in its brief before the Third Circuit (Gov't C.A. Br. 3) thereby waiving any argument here that the claim was not properly preserved for appeal. *United States v. Olano*, 507 U.S. 725, 733-34 (1993) ("Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'"). Accordingly, the government cannot now complain that Mr. Dillon forfeited the issue. *Olano*, 507 U.S. at 731.

Even if the government could assert forfeiture to defeat Mr. Dillon's challenge to his criminal history calculation, its argument would fail because Mr. Dillon's *pro se* Section 3582(c)(2) pleadings specifically asked the district court to reconsider his criminal history category as enhanced by the California misdemeanor resisting arrest conviction and requested a new presentence report. (Docket Entry 217.) Liberally interpreted, as they must be, Mr. Dillon's *pro se* pleadings sufficiently preserved a challenge to the criminal history calculation. *Erickson v. Pardus*, 551

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sentence is imposed (Br. 41-42) Mr. Dillon disagrees for the reasons set forth, *supra*, in Point I.A.

U.S. 89, 94 (2007) (*per curiam*) (noting that *pro se* filing is "to be liberally construed"). Moreover, the district court addressed the issue and found it could not revisit its prior determination.[17] (J.A. 42.)

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[17] The government claims that Mr. Dillon's failure to object to the district court's original criminal history calculation resulted in forfeiture. (Br. 39-40.) His complaints both here and in the Third Circuit, however, relate to the new sentence imposed under §3582(c)(2), and the fact that he did not object to the court's original calculation does not affect preservation for this appeal. In the context of the Section 3582(c)(2) proceedings, however, the district court's initial criminal history determination nevertheless constitutes the law of the case, which prevents reconsideration of the issue unless, as here, an exception exists. (See Pet. Br. 47-48.)

Notably, the government also has asked the district court to revisit an original Guidelines calculation during a Section 3582(c)(2) resentencing. *See United States v. Hughes*, Criminal No. 97-670-1 (N.D. Ill. Dec. 30, 2009) (Government's Response to Motion for Reduction of Sentence and Motion for Relief Pursuant to Rule 60(b) of the Federal Rules of Civil Procedure; order denying motion for sentence reduction). There, the district court found the defendant responsible for "at least 1.5 kilograms" but less than 4.5 kilograms of crack at the initial sentencing. *Id.*; *see* USSG §2D1.1 (Drug Quantity Table). At the Section 3582(c)(2) resentencing, the court, at the government's urging, reconsidered its drug quantity determination and found that the defendant trafficked in no less that 11 kilograms of crack. *Id.* Based on its new finding, the court found Hughes ineligible for relief under §3582(c)(2), as his offense involved 4.5 kilograms or more of crack. *Id.*; USSG §2D1.1 comment. (n.10 (D)(ii)(I)).

B. The Government Waived Any Argument That The District Court's Criminal History Determination Was Not Erroneous.

In the district court, the Government chose not to address Mr. Dillon's request for reconsideration of the court's prior criminal history determination. (J.A. 206, 212, 217.) And, in the Third Circuit, it did not dispute whether the criminal history point was warranted under USSG §4A1.2(c)(1)(A). (Gov't C.A. Br. 43-45.) Its newly asserted argument – that the district correctly assessed a criminal history point under USSG §4A1.2(c)(1)(A) – makes its first appearance in the Brief for the United States. (Br. 38.)

Because the government's argument that the district court did not err in calculating Mr. Dillon's criminal history score was presented for the first time in its merits brief, it is waived. *See, generally, United States v. Boudreau*, 564 F.3d 431, 435 (6th Cir. 2009) ("[A]s with any other argument, the government can forfeit a waiver argument by failing to raise it in a timely fashion.").

Even if the government's omissions below did not constitute waiver, the Court should exercise its discretion and find the government's argument waived under this Court's Rule 15.2. Supreme Court Rule 15.2 ("[a]ny objection to consideration of a question presented based on what occurred in the proceedings below . . . may be deemed waived unless called to the Court's attention in the brief in opposition."); *see, e.g.*,

Baldwin v. Reese, 541 U.S. 27, 34 (2004) (deeming argument not raised in Court of Appeals or in brief in opposition waived under Rule 15.2).

C. Because The Courts Below Did Not Address The Merits Of Mr. Dillon's Claim, This Court Should Remand For The District Court To Consider The Issue In The First Instance.

Neither the district court nor the Third Circuit reached the merits of Mr. Dillon's attack on his criminal history calculation, as each court found the district court lacked the authority under §3582(c)(2) and USSG §1B1.10 to reexamine its prior determination. (J.A. 42, 54-55.) Therefore, the only question this Court must answer is whether, *assuming* there was error in the Guidelines calculation, the district court was required to impose a sentence based on an erroneously calculated Guidelines range. *See Medimmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 136-37 (2007) (finding reversal and remand for further proceedings proper and declining to consider reasons raised for the first time in Respondent's merits brief). Insofar as this Court "ordinarily [does] not decide in the first instance issues not decided below," *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 169 (2004), it should defer ruling on the merits of the Guidelines calculation error issue and remand with instructions that the district court be given an opportunity to decide the issue in the first instance.

In sum, this Court should find the government forfeited its waiver argument and that it waived its newly asserted claim that the district court correctly calculated Mr. Dillon's criminal history score. The government has provided no reason why the Court should overlook its many failures to present the arguments it raises for the first time here.

If the Court agrees that the district court had the duty and authority to correct an erroneous criminal history calculation during a Section 3582(c)(2) re-sentencing, it should vacate the sentence and remand to give the district court an opportunity to make a determination in the first instance.[18]

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[18] The government asserts for the first time that Mr. Dillon "identifies nothing in California law that would permit a court to impose probation and then suspend it[,]" calling such a disposition "unorthodox." (Br. 43, 44.) In support, the government attempts to distinguish *United States v. Mejia*, 559 F.3d 1113 (9th Cir. 2009), by erroneously asserting that the defendant's California probation in that case "had not been suspended, but rather was terminated three days after it was imposed." (Br. 43.) The decision in *Mejia*, however, rested as much on the suspended nature of the sentence as on its shortened term: "[S]uspension of Mejia's [California] probationary sentence combined with his actual service of only a three-day probationary term was less than the one year required by §4A1.2(c)(1)(A) for inclusion in this criminal history." *Id.*, 559 F.3d at 1116. Thus, *Mejia* supports, rather than undercuts, Mr. Dillon's right to have the matter assessed by the district court on remand.

CONCLUSION

The judgment of the court of appeals should be reversed.

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AMICUS CURIAE BRIEF

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PERCY DILLON,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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QUESTION PRESENTED

Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. §3582(c)(2).

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici curiae, Federal Public and Community Defenders in the United States (not including the Federal Defender representing the petitioner in this matter) have offices in 90 of the 94 federal judicial districts. *Amicus curiae*, the National Association of Federal Defenders, formed in 1995, is a nationwide, non-profit, volunteer organization whose membership is comprised of attorneys who work for federal public and community defender organizations authorized under the Criminal Justice Act. *Amici curiae* represent tens of thousands of individuals sentenced in federal court each year, including thousands of individuals in proceedings under 18 U.S.C. §3582. The issue presented in this case is of great importance to our work and the welfare of our clients.

INTRODUCTION

Amici support Petitioner's persuasive challenge, based on the Sixth Amendment holding in *United States v. Booker*, 543 U.S. 220 (2005), and its remedial interpretation of the sentencing law, to the lower courts' reading of USSG §1B1.10, p.s. (2008) as mandatory. As Petitioner makes clear, it is §1B1.10

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[1] The parties have consented to the filing of this brief and copies of letters of consent have been lodged with the Clerk of the Court. No counsel for a party authored any part of this brief. Sup. Ct. R. 37.6. No person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief.

that purports to render the Guidelines mandatory in proceedings under 18 U.S.C. §3582(c)(2), not the statute itself.[2] *Amici* further address the plain meaning of 18 U.S.C. §3582(c)(2) and the pertinent directives to the Sentencing Commission (Commission), namely, 28 U.S.C. §994(a)(2)(C), (o) and (u). Taken together, these provisions of the Sentencing Reform Act (SRA) give the Commission an important gatekeeping role with respect to the court's *power to entertain* a motion, but do not permit the Commission to control the court's ultimate *resentencing decision*. Because the 2008 version of §1B1.10, unlike its predecessor, purports to control the substance of the court's resentencing decision, it is at odds with the relevant provisions of the SRA and thus invalid.

When a district court considers a motion for reduction of a defendant's term of imprisonment under §3582(c)(2), it must potentially resolve two questions. In every case, the court must first decide whether it has the power to impose a new sentence. To do so, it decides whether the defendant was "sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. §994(o)." Second, if the court has the power to do so, it must decide whether and to what extent to reduce the term of imprisonment. It may "reduce the term of imprisonment, after considering the factors set forth

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[2] Pet'r's Br. 34-36 & n.18.

in section 3553(a) to the extent that they are applicable, if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

In describing these two stages of the judicial decision, §3582(c)(2) references duties of the Commission in two distinct clauses. First, §3582(c)(2) establishes that the court's power to reduce a term of imprisonment is triggered by the Commission's lowering of a sentencing range "pursuant to 28 U.S.C. §994(o)," which requires the Commission to review and revise its guidelines. Second, it establishes that the court, in deciding whether and to what extent to reduce the term of imprisonment, is to act "consistent with applicable policy statements issued by the Sentencing Commission," which are specifically authorized for §3582(c)(2) proceedings by 28 U.S.C. §994(a)(2)(C). Both matters – the triggering mechanism and the resentencing decision – have long been addressed in a policy statement, USSG §1B1.10, p.s.

Before March 3, 2008, that policy statement addressed the triggering mechanism by stating that a reduction in the term of imprisonment was "authorized" only if the applicable guideline range "has subsequently been lowered" by an amendment "listed in subsection (c)." USSG §1B1.10(a) & comment. (n.1) (2007). As to the resentencing decision, it merely advised that the court "should consider the term of imprisonment that it would have imposed had the amendment(s) to the guidelines listed in subsection (c) been in effect at the time the defendant was

sentenced." *See id.* §1B1.10(b). It advised that, except that the reduced term could not be less than the term already served, the court had "the discretion to determine whether, and to what extent, to reduce a term of imprisonment under this section." *See id.* & comment. (n.3).

On May 1, 2007, the Commission sent to Congress an amendment to reduce offense levels by two for most crack cocaine offenses, explaining that "[c]urrent data and information continue to support the Commission's consistently held position that the 100-to-1 drug quantity ratio significantly undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere." *See* 72 Fed.Reg. 28,558, 28,572-73 (May 21, 2007). The amendment would "alleviate some" of the "urgent and compelling problems . . . associated with the 100-to-1 drug quantity ratio," while still tying the guidelines to the mandatory minimum statute. *Id.*

In July and September 2007, the Commission published a "request for public comment" regarding (1) whether the crack amendment "should be included in subsection (c) of §1B1.10 as [an] amendment[ ] that may be applied retroactively," and (2) if so, whether §1B1.10 should be amended "to provide guidance to the courts on *the procedure to be used* when applying an amendment retroactively under 18 U.S.C.

§3582(c)(2)" (emphasis added).[3] The Commission received numerous comments supporting retroactivity, a few opposing it, and four comments regarding "procedure."[4]

The Commission at no time solicited public comment on whether it should attempt to prevent judges from reducing sentences below the amended guideline range, and at no time published any language for such a policy statement. The Commission received a letter on behalf of the Criminal Law Committee of the Judicial Conference, recommending that the crack amendment be made retroactive and stating that it was "clear that, in the wake of *Booker*, all resentencings now have to be done under an advisory guidelines system."[5]

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[3] *See* 72 Fed.Reg. 41,794, 41,794-95 (July 31, 2007); 72 Fed.Reg. 54,960, 54,960-61 (Sept. 27, 2007).

[4] U.S. Sent'g Comm'n, Public Comment Letters on the Retroactivity of Amendments 9 & 12, November 2007, http://www.ussc.gov/pubcom_retro/pc200711.htm. "Procedure" was addressed in some fashion by the Criminal Law Committee of the Judicial Conference, the Federal Public and Community Defenders, the Practitioners Advisory Group, and Dawn E. Worsley, Esq. *Id.*

[5] *See* Letter from Paul Cassell, Chair, Committee on Criminal Law of the Judicial Conference of the United States Re: Comments on Retroactivity of Crack Cocaine Amendments at 1, 5-6 (Nov. 2, 2007), http://www.ussc.gov/pubcom_retro/pc200711_004.pdf. In the letter, Judge Cassell said that he believed the Commission could, by policy statement, merely advise that "the court should only consider the change in the crack guideline made by the Commission and whether this change now suggests

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On October 15, 2007, the Commission issued a "notice of public hearing," scheduled for November 13, 2007, solely regarding whether the amendment "should be applied retroactively to previously sentenced defendants."[6] Notwithstanding the limited purpose of the hearing, Commissioners questioned representatives of the Judiciary, the defense bar and the prosecution about whether they thought *Booker* would apply in §3582(c)(2) proceedings, what the effect of this Court's forthcoming decision in *Kimbrough v. United States*, 552 U.S. 85 (2007), might be, and whether the Commission should attempt to limit these effects in §3582(c)(2) proceedings.[7] The witnesses advised that this was an issue for the courts, not the Commission, to decide.[8] A law professor then

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a lower sentence in light of the factors set forth in 18 U.S.C. §3553(a) to the extent that they are applicable." *Id.* at 6. This suggestion was not included in the Criminal Law Committee's written testimony for the later public hearing. *See* Testimony of Judge Reggie B. Walton, Nov. 13, 2007, http://www.ussc.gov/hearings/11_13_07/Walton_testimony.pdf. Nor was it published for comment.

[6] 72 Fed.Reg. 58,345, 58,345-46 (Oct. 15, 2007).

[7] Tr. of Public Hearing on Retroactivity Before the U.S. Sent'g Comm'n at 29, 81, 85-86, 97-98, 134 (Nov. 13, 2007), http://www.ussc.gov/hearings/11_13_07/Transcript111307.pdf.

[8] Testifying on behalf of the Criminal Law Committee, Judge Walton emphasized that this was an issue for the lower courts and perhaps ultimately this Court to decide. *Id.* at 29-31, 35-36. Prosecution and defense witnesses agreed. *Id.* 54-55, 66-67, 82-85, 93-94, 98-99, 134-35. The defense bar also urged the Commission not to attempt to limit judicial discretion in §3582(c)(2) proceedings without a full opportunity for study and

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opined that the Commission could issue a policy statement placing an "absolute" limit on the extent of reduction of the term of imprisonment. This lone witness acknowledged that no court had adopted his view of §3582(c)(2) proceedings, and that the courts may deem such a "policy statement" to be advisory.[9] Practitioners and judges had no opportunity to respond to this unexpected proposal, which was never published for comment in any form.

On December 11, 2007, the day after this Court decided *Kimbrough*, the Commission voted to make its crack amendments retroactive, and also to substantially revise its policy statement.[10] The revised §1B1.10, p.s. (Mar. 3, 2008) contains unprecedented language that attempts to dictate all aspects of the court's decision under §3582(c)(2): "As required by 18 U.S.C. §3582(c)(2), any such reduction in the defendant's term of imprisonment shall be consistent with this policy statement." USSG §1B1.10(a)(1), p.s. The policy statement repeatedly refers to "this policy statement" and "§3582(c)(2)" interchangeably. *See id.* §1B1.10(a)(2), (a)(3), (b)(1), (b)(2)(A). It purports to impose a mandatory, absolute limit on the court's resentencing decision, stating that "the court *shall*

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comment from the public and practitioners, *id.* at 66-67, 82-83, and noted that there was no such limitation previously. *Id.* at 60-61, 77.

[9] *Id.* at 153-55.

[10] 73 Fed.Reg. 217 (Jan. 2, 2008); USSG, App. C, Amend. 712 (Mar. 3, 2008).

not reduce the defendant's term of imprisonment *under 18 U.S.C. §3582(c)(2) and this policy statement* to a term that is less than the minimum of the amended guideline range." *Id.* §1B1.10(b)(2)(A) (emphasis added). It asserts that "the court shall consider the factors set forth in 18 U.S.C. §3553(a) . . . only within the limits described in subsection (b)." *Id.*, comment. (n.1(B)(i)). And, while the policy statement permits a reduction based on the amended range and a further "comparable" reduction if the original sentence included a "downward departure," *id.* §1B1.10(b)(2)(B) & comment. (n.3) (2008), it provides that any "further reduction generally would not be appropriate . . . if the original term of imprisonment constituted a non-guideline sentence determined pursuant to 18 U.S.C. §3553(a) and *United States v. Booker*, 543 U.S. 220 (2005)."[11] *Id.* §1B1.10(b)(2)(B).

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[11] The revised policy statement also implicitly redefines the requirement in the first clause of §3582(c)(2) that the defendant was sentenced "based on" a subsequently lowered guideline range by directing that no reduction is "authorized" if an amendment "does not have the effect of lowering the defendant's applicable guideline range . . . because of the operation of another guideline or statutory provision (*e.g.*, a statutory mandatory minimum)." USSG §1B1.10(b)(1) & comment. (n.1(A)). The courts are split on whether this language obliterates the "based on" language of the first clause of §3582(c)(2) by virtue of its final "consistent with" clause. *Compare, e.g., United States v. Doe*, 564 F.3d 305, 309-15 (3d Cir. 2009), *with id.* at 315-18 (Fuentes, J., concurring), *and United States v. McGee*, 553 F.3d 225 (2d Cir. 2009).

The sole rationale for the amendment was the tautological statement that it "clarif[ies] when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. §3582(c)(2)." *See* Reason for Amendment, USSG, App. C, Amend. 712 (Mar. 3, 2008).

SUMMARY OF THE ARGUMENT

Because revised §1B1.10 purports to establish mandatory decrees that control the court's resentencing decision, it conflicts with the plain language and statutory structure of the pertinent provisions of the SRA. In Part I, we show that the plain language of §3582(c)(2) commits the resentencing decision to the court's sound discretion, consistent with both §3553(a) and applicable nonbinding policy statements issued by the Commission pursuant to 28 U.S.C. §994(a)(2)(C). In Parts II and III, we show that the Commission's effort to control that resentencing decision with a mandatory rule is based on two false assumptions. Contrary to one assumption, §994(u) does not allow the Commission to issue a rule controlling the resentencing decision. Rather, because §994(u) supplements only the Commission's power under §994(o) to amend guidelines, §994(u) gives the Commission only a gatekeeping role with respect to §3582(c)(2) proceedings. Contrary to the second assumption, neither §3582(c)(2), which is not a directive to the Commission, nor the directive to the Commission to issue the applicable policy statements,

authorizes the Commission to issue binding policy statements. A "policy statement" is, by definition, nonbinding. In Part IV, we show that §1B1.10(b)(2)(A) is also invalid because it was issued without proper notice and comment.

This Court should reverse the judgment of the court of appeals and remand for resentencing absent the sentencing floor that §1B1.10(b)(2)(A) purports to set. *See United States v. LaBonte*, 520 U.S. 751, 762 (1997).

ARGUMENT

I. The Plain Language of §3582(c)(2) Commits the Resentencing Decision to the Court's Sound Discretion.

Section 3582(c)(2) of Title 18 describes one of a handful of ways that a court may modify an otherwise final sentence of imprisonment. *See* 18 U.S.C. §3582(b). The statute has a two-part structure. The first clause triggers the court's power to consider a motion to reduce a term of imprisonment "in the case of a defendant who has been sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission pursuant to 28 U.S.C. §994(o)." The last three clauses make the court's resentencing decision discretionary and identify the pertinent considerations: "the court may reduce the term of imprisonment, after considering the factors set forth in section 3553(a) to the extent that they are applicable, if such

a reduction is consistent with applicable policy statements issued by the Sentencing Commission."

As its title indicates, §3553(a) sets out "Factors to be considered in imposing a sentence." The overarching instruction (and first factor) directs that the court "shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of sentencing] set forth in" subsection (a)(2). The statute further directs that "in determining the particular sentence," the court "shall consider" those purposes, along with other factors, including the circumstances of the offense and the history and characteristics of the defendant, §3553(a)(1), the applicable guideline range, §3553(a)(4)(A)(i), and any pertinent policy statements, §3553(a)(5)(A). According to the plain language of §3553(a), the guideline range and any pertinent policy statement are two of several factors to be considered and balanced in imposing a particular sentence.[12]

"A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant."

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[12] *See Kimbrough v. United States*, 552 U.S. 85, 101 (2007) ("The statute . . . contains an overarching provision instructing district courts to 'impose a sentence sufficient, but not greater than necessary,' to achieve the goals of sentencing."); *id.* at 90 ("[T]he Guidelines, formerly mandatory, now serve as one factor among several courts must consider in determining an appropriate sentence."); *Gall v. United States*, 552 U.S. 38, 59 (2007) (The "Guidelines are only one of the factors to consider when imposing sentence.").

Hibbs v. Winn, 542 U.S. 88, 101 (2004) (internal citations and quotation marks omitted). Thus, the requirement in the last clause of §3582(c)(2) that the court act "consistent[ly] with applicable policy statements" must be read to elaborate on, and not contradict, the preceding clause, which commands the court to "consider" (without limitation) all of the factors set forth in §3553(a), including "any pertinent policy statement" issued by the Commission, listed at subsection (a)(5). The last clause clarifies that there are particular policy statements applicable in §3582(c)(2) proceedings that are to be used as guidance in the exercise of discretion. To understand "consistent with" as meaning "bound by," as the lower courts did, would turn the final clause into a contradiction of the preceding clause. This is impermissible.[13]

While these provisions of Title 18 control the court's decision, the Commission's duties are located in Title 28. There, among the "general policy

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[13] *See District of Columbia v. Heller*, 128 S.Ct. 2783, 2795-96 (2008) (a "qualifying phrase that contradicts the word or phrase it modifies is unknown this side of the looking glass"); *Meacham v. Knolls Atomic Power Laboratory*, 128 S.Ct. 2395, 2402 n.11 (2008) ("Congress surely could not have meant this phrase to contradict its express allocation of the burden, in the same amendment."); *Park 'n Fly v. Dollar Park & Fly*, 469 U.S. 189, 197 (1985) (rejecting construction of statutory text that would "effectively emasculate[ ]" another provision of the same act); *Mass. Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (rejecting interpretation of one phrase at the end of a statutory provision that would "render superfluous the preceding clauses").

statements" the Commission is directed to issue are those applicable to "the sentence modification provisions set forth in [§]3582(c) of title 18." 28 U.S.C. §994(a)(2)(C). Such policy statements might, for example, encourage judges to consider the defendant's conduct after his original sentencing, or to consider reducing the term of supervised release if the term of imprisonment recommended by the amended guideline range is less than the defendant's remaining time to be served. As shown in Part III, these policy statements are by definition nonbinding, and were intended by Congress to be nonbinding.

Section 3582(c)'s directive to the courts to act "consistent[ly]" with applicable policy statements does not authorize the Commission to issue policy statements at all, much less to pronounce any of its policy statements binding. The Commission, however, has decided that it can issue a policy statement that dictates the court's resentencing decision by making the minimum of the amended guideline range the mandatory sentencing floor. It first assumes that the "consistent with" clause of §3582(c)(2) gives it the power to issue policy statements pursuant to 28 U.S.C. §994(a)(2)(C) with the binding force of law. It next assumes that, since it can (by hypothesis) issue binding policy statements, 28 U.S.C. §994(u), which supplements the Commission's power to amend guidelines pursuant to 28 U.S.C. §994(o), gives it the power to issue a binding policy statement to control the court's resentencing decision. Parts II and III demonstrate the error in each of these assumptions.

II. Section 994(u) Supplements the Commission's Power to Amend Guidelines Under §994(o), Not Its Power to Issue Policy Statements Under §994(a)(2)(C), and Does Not Authorize the Revised §1B1.10(b).

"In addition to the duty to review and revise the Guidelines [pursuant to §994(o)], Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect [pursuant to] 28 U.S.C. §994(u)." *Braxton v. United States*, 500 U.S. 344, 348 (1991) (emphasis in original). As *Braxton* describes it, §994(u) supplements the Commission's duty under §994(o) to review and revise its guidelines. Section 994(u), therefore, empowers the Commission to issue a specification as to the retroactivity of each amendment made under §994(o) that reduces offense guideline ranges. The Commission can state, on an amendment-by-amendment basis, whether the amendment is available for retroactive application under §3582(c)(2), and by what amount the amendment retroactively reduces the pertinent guideline range.

Section 994(u) is not itself mentioned in 18 U.S.C. §3582(c)(2). One reasonably asks why the courts would be required to consider a specification made under §994(u) at all. The answer, given in *Braxton*, is that it supplements the Commission's duty under §994(o) to review and revise the guidelines. Section 994(o) *is* mentioned in §3582(c)(2), in the first clause, which triggers the court's power to act. Viewed

as a supplement to §994(o), section 994(u) finds an attenuated basis in the text of §3582(c)(2). Because that basis is found only in the first clause, any specification the Commission makes under §994(u) affects only the court's determination of whether it has the power to act, and not the extent or scope of the court's resentencing decision.

The Commission's 2008 amendment to §1B1.10(b) is based on a misunderstanding of its power. As its authority for issuing a "policy statement" purporting to control the court's resentencing decision, the Commission cites 18 U.S.C. §3582(c)(2), as well as 28 U.S.C. §994(a) and §994(u).[14] But nothing in §3582(c)(2) authorizes any action by the Commission, just as nothing in §994(u) is directed at the action of the court. The scope and limits of the courts' sentencing powers are all and only contained in Chapter 227 of Title 18, while directions to the Commission are in Chapter 58 of Title 28. Whatever special authority §994(u) may confer on the Commission, its impact on a judge acting under §3582(c)(2) is indirect at best; it does not allow the Commission to control the extent or scope of the court's resentencing decision.

1. The Commission's assumption that §994(u) authorizes the "policy statements" referenced in the

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[14] *See* 73 Fed.Reg. 217 (Jan. 2, 2008) (citing §994(a), §994(u), §3582(c)(2)); USSG, App. C, Amend. 712 (Mar. 3, 2008) (relying only on §3582(c)(2)).

final clause of §3582(c)(2) is belied by three aspects of the pertinent statutory provisions.

First, §994(a)(2)(C) – not §994(u) – directs that the Commission "shall promulgate" the "policy statements regarding" the "sentence modification provisions set forth in [§]3582(c)." 28 U.S.C. §994(a)(2)(C). These are the "policy statements" referenced in the last clause of §3582(c)(2), which is applicable to the court's resentencing decision. These policy statements exist independent of §994(u).

Second, §994(u) says nothing about "policy statements." Although Congress's other directives to the Commission under §994 state that the Commission is to act through "guidelines" or "policy statements," *see* 28 U.S.C. §994(a), (c)-(n), (t), (v), (y), section 994(u) does not. It states in full:

> If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses, it shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced.

28 U.S.C. §994(u). The most apt comparison is with the sentence reduction governed by §3582(c)(2)'s neighbor, §3582(c)(1). There, Congress directs the Commission to act through "policy statements":

> The Commission, in promulgating general policy statements regarding the sentencing modification provisions in section 3582(c)(1)(A)

> of title 18, shall describe what should be considered extraordinary and compelling reasons for sentence reduction . . .

28 U.S.C. §994(t). Section 994(t) tells the Commission to act through "policy statements" referenced in §3582(c), whereas §994(u) does not.

The omission of the particular term "policy statements" from §994(u) is significant because "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Here, the disparate exclusion signifies that, unlike §994(t), section 994(u) does not direct the issuance of policy statements for use under §3582(c).

Third, unlike §994(t), section 994(u) grants the Commission an "unusual explicit *power*."[15] *Braxton*, 500 U.S. at 348 (emphasis in original). Section 994(u) should not be interpreted, against the grain, to address the issuance of mere policy statements.

These aspects of the statute show that §994(u) is not directed at the issuance of the "policy statements" referenced in the final clause of §3582(c)(2) – the

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[15] As explained below in Part III, "a binding policy is an oxymoron." *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

clause that addresses the district court's resentencing decision.

2. Section 994(u) serves a different and important purpose. It supplements the Commission's amendment power under §994(o) with the power to decide what retroactive effect to give each particular amendment. This is clear both from the plain language of §994(u) and §3582(c)(2), and from their complementary purposes.

a. Section 994(u) begins with the very clause that sets the limit on the power it grants: "*If the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses*, it shall specify. . . ." 28 U.S.C. §994(u) (emphasis added). In that opening clause, §994(u) establishes that it empowers the Commission to act only in connection with its issuance of a particular amendment under §994(o). The first clause of §994(u) should be understood to set this limit on the Commission's power because "[a] statute should be construed so that effect is given to all its provisions," and because that clause clearly establishes a prerequisite to Commission action under §994(u). *Hibbs*, 542 U.S. at 101.

Because §994(u) empowers the Commission to act only in connection with its issuance of a particular guideline amendment under §994(o), it pertains only to the first clause of §3582(c)(2), and directs action only on an amendment-by-amendment basis. It directs the Commission to specify whether and by what

amount – *i.e.*, by how many offense levels – each particular amendment is to retroactively affect the calculation of a defendant's guideline range.[16] This specification gives the district court the information it needs to decide whether it has the power to entertain a §3582(c)(2) motion. By issuing this specification, the Commission acts as the gatekeeper of §3582(c)(2), ensuring that its amendments trigger the court's power only when appropriate in light of its reasons for "reduc[ing]" the "term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses." 28 U.S.C. §994(u).

b. The meaning of §994(u) is made even clearer by considering its "purpose and context" within the larger purpose of §3582(c)(2). *See Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006). Congress enacted §3582(c)(2) in order to preserve a desired feature of parole – allowing an earlier release if

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[16] In the form the Guidelines have taken, the Commission "reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," 28 U.S.C. §994(u), simply by reducing offense levels for a particular offense or category of offenses. However, when Congress enacted the SRA, it was not clear precisely what form the Guidelines would take. *See, e.g.*, S. Rep. No. 98-225 at 168 ("guidelines may be . . . in the form of a series of grids, charts, formulas or other appropriate devices"). It may have appeared to Congress that in some circumstances it could be necessary for the Commission, in order to ensure the triggering of §3582(c)(2), to specify not only whether an amendment would have retroactive effect but also "by what amount" it would have retroactive effect.

community attitudes toward a particular crime subsequently changed. S. Rep. No. 98-225 at 55-56, 180 (1983). The Parole Commission had the authority to amend its guidelines. 18 U.S.C. §4203(a)(1) (enacted Mar. 15, 1976 and prospectively repealed with the passage of the SRA). The system allowed for earlier release of a prisoner when applicable parole guidelines were amended, and the release decision was ultimately based on an individualized assessment of factors similar to those set forth in §3553(a).[17] *See* 18 U.S.C. §4206(c); 28 C.F.R. §2.18-.19 (1984).

When drafting the SRA, Congress decided to preserve the flexibility of the parole system "for cases in which the sentencing guidelines for the offense of which the defend[ant] was convicted have been later amended to provide for a shorter term of imprisonment." S. Rep. No. 98-225 at 55-56. Congress chose to abolish parole, *id.*, and believed that the power to reduce a sentence properly "belong[ed]" in the "judiciary." *Id.* at 121. Consequently, it sought to create a

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[17] *See* 18 U.S.C. §4206(a) (directing the Parole Commission to consider "the nature and circumstances of the offense," "the history and characteristics of the prisoner," and to determine that release would not "depreciate the seriousness of the offense," or "promote disrespect for law," or "jeopardize the public welfare"). In addition, if a prisoner was not yet eligible for parole, the Bureau of Prisons could move the district court to reduce the prisoner's sentence. 18 U.S.C. §4205(g). Before this statutory mechanism was enacted, a district court had authority to modify a prisoner's parole eligibility date, thus allowing an earlier release. *See, e.g.*, *United States v. Lancer*, 508 F.2d 719, 729 n.33 (3d Cir. 1975) (en banc).

judicial replacement to perform some of the Parole Commission's prior function.

To do so, Congress needed to create two mechanisms. First it had to create a statutory vehicle for reducing a final sentence, since 28 U.S.C. §2255 was available only to correct sentences imposed in violation of law. *See United States v. Addonizio*, 442 U.S. 178, 190 (1979). Second, Congress had to create a mechanism to ensure that amendments would be retroactively available when appropriate. Amended guidelines would be clearly available on a retroactive basis only if the Commission was specially empowered to issue them with retroactive force,[18] and if the Commission specifically designated them as retroactive.[19] At the same time, Congress did not want to burden the courts with a flood of unjustified petitions. S. Rep. No. 98-225 at 180.

Congress created the vehicle for relief by enacting §3582(c)(2). Congress satisfied the need for a gatekeeper by explicitly giving the Commission, through §994(u), the authority to "specify in what circumstances and by what amount" its amendments to "the term of imprisonment recommended in the guidelines applicable to a particular offense or

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[18] *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988); *Brimstone R. & Canal Co. v. United States*, 276 U.S. 104, 123-24 (1928).

[19] *See* 1 U.S.C. §109; *Warden v. Marrero*, 417 U.S. 653 (1974); *Bowen*, 488 U.S. at 208.

category of offenses" are retroactively available. 28 U.S.C. §994(u). The specifications the Commission makes are used by the court to determine whether a particular amendment triggers its power to consider a motion under §3582(c)(2) by lowering, pursuant to 28 U.S.C. §994(o), a sentencing range upon which the defendant's sentence was based. That is the purpose of these specifications. Their purpose does not extend to the resentencing decision. Congress left the ultimate determination as to when to release an individual offender to the district court, consistent with the nonbinding policy statements issued under §994(a)(2)(C) and the sentencing factors set forth in §3553(a).

3. By radically reshaping §1B1.10(b), the Commission claims for itself much broader power than allowed by §994(u) or than the courts are required to follow by §3582(c)(2). Section 994(u) does not allow the Commission to dictate how the district court balances, in individual cases, the competing and myriad factors set forth in §3553(a) and expressed through §994(a)(2)(C) policy statements. Consequently, it does not give the Commission the power to set hard sentencing floors.

III. The Term "Policy Statement" Used in the Final Clause of §3582(c)(2) Cannot Mean a Binding Rule.

The Commission's revised policy statement purports to bind federal judges in their resentencing

decisions under §3582(c)(2) to the minimum of the amended guideline range. *See* USSG §1B1.10(b)(2)(A) & comment. (n.1(B)), p.s. (2008). The Commission assumes that it has the power to do so because the final clause of §3582(c)(2) requires the court to act in a manner "consistent with applicable policy statements issued by the Sentencing Commission."[20] For the reasons that follow, neither this clause, which is not directed to the Commission at all, nor the directive to the Commission to issue the applicable policy statements, authorizes the Commission to issue a binding policy statement.

A. The term "policy statement," as ordinarily used, means a non-binding statement of policy.

In the absence of a statutory definition,[21] this Court "construe[s] a statutory term in accordance with its ordinary or natural meaning," *FDIC v. Meyer*, 510 U.S. 471, 476 (1994), or its "common usage." *Consumer Prod. Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108-09 (1980).

1. The term "policy statement" has a firmly established meaning under the Administrative Procedure Act (APA). That meaning is best grasped when

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[20] *See* USSG, App. C, Amend. 712 (Reason for Amendment) (Mar. 3, 2008); USSG §1B1.10(a)(1).

[21] The SRA gives no definition of "policy statement." 28 U.S.C. §998 ("Definitions").

"policy statement" is contrasted with two other terms, "legislative rule" and "interpretive rule." 5 U.S.C. §553(b). Legislative rules impose binding legal norms on courts and private parties. *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 95 (D.C. Cir. 1997). An agency cannot issue a legislative rule unless Congress has delegated it the authority to do so, and unless the agency has complied with the APA's notice and comment procedure. *Chrysler Corp.*, 441 U.S. at 302; *Syncor*, 127 F.3d at 95. Those limits on the promulgation of binding substantive rules are important to prevent an agency from exercising power "autocratically." Robert A. Anthony, *"Interpretive" Rules, "Legislative" Rules and "Spurious" Rules: Lifting the Smog*, 8 Admin. L. J. Am. U. 1, 3, 15 (1994) (hereinafter, Anthony, *Spurious Rules*).

Interpretive rules merely explain or interpret the agency's own ambiguous legislative rules. *See Christensen v. Harris*, 529 U.S. 576, 587-88 (2000); *Auer v. Robbins*, 519 U.S. 452, 461-63 (1997). Though entitled to deference with respect to the meaning of the legislative rule it interprets, an interpretive rule has no independent "force of law." *Christensen*, 529 U.S. at 587; *Shalala v. Guernsey Mem. Hosp.*, 514 U.S. 87, 99 (1995); *Nat'l Latino Media Coalition v. FCC*, 816 F.2d 785, 788 (D.C. Cir. 1987). Interpretive rules are thus exempt from notice and comment requirements. 5 U.S.C. §553(b).

A policy statement, also exempt from notice and comment, is "merely the announcement to the public

of the policy which the agency" favors presently; it is an "informational device." *Pacific Gas & Elec. Co. v. Federal Power Comm'n*, 506 F.2d 33, 38-39 (D.C. Cir. 1974).[22] Policy statements lack the force of law. *Nat'l Park Hosp. Ass'n v. Dept. of the Interior*, 538 U.S. 803, 809 (2003). Even in the agency's own "administrative proceedings," a policy statement does not serve as a "binding norm." *PG&E*, 506 F.2d at 38-39. "A binding policy is an oxymoron." *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988).

2. The Guidelines Manual echoes the APA's taxonomy in "text of three varieties." *Stinson v. United States*, 508 U.S. 36, 41, 44-45 (1993). First, as created by Congress, "the guidelines are the equivalent of legislative rules adopted by federal agencies." *Id.* at 45. The "guidelines," unlike commentary or policy statements, are subject to the APA's notice and comment procedure and congressional approval. *See* 28 U.S.C. §994(p), (x); *Mistretta v. United States*, 488 U.S. 361, 394 (1989) (§994(x) subjects the Commission's "rulemaking . . . to the notice and comment requirements of the Administrative Procedure Act").

Second, "official commentary," which assists in the interpretation or application of particular guidelines, "is akin to an agency's interpretation of its own

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[22] *PG&E* provides a "classic" statement distinguishing legislative rules from policy statements. *Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1111 (D.C. Cir. 1993).

legislative rules." *Stinson*, 508 U.S. at 45. Likewise, a "policy statement[] regarding application of [a] guideline[]," 28 U.S.C. §994(a)(2), "is an authoritative guide to the meaning of the applicable Guideline." *Williams v. United States*, 503 U.S. 193, 201 (1992).

In *Williams* and *Stinson*, this Court twice dealt with the second type of "text," *i.e.*, provisions "akin to an agency's interpretation of its own legislative rules." *Stinson*, 508 U.S. at 45. In *Williams*, the Court held that an error in interpreting a "policy statement" that interpreted a particular guideline was an "incorrect application of the sentencing guidelines" within the meaning of 18 U.S.C. §3742(f)(1). *Id.* at 200-01. The policy statement was a "'general policy statement[] regarding application of the guidelines,'" *id.* at 200 (quoting 28 U.S.C. §994(a)(2)), and was thus "an authoritative guide to the meaning of the applicable Guideline," *viz.*, the criminal history guidelines. *Id.* at 196, 200. *Williams* did not give the policy statement the independent binding force that a legislative rule (*i.e.*, a guideline) would have had at the time. It simply established that, if a policy statement functions like an interpretive rule, it is an authoritative guide to the meaning of the guideline it interprets. *Id.* at 200. In *Stinson*, the Court reiterated this approach. While *Williams* involved a "policy statement" that functioned as an interpretive rule, *Stinson* involved "commentary" that likewise had the "functional purpose" of an interpretive rule, in that it explained the career offender guideline. *Stinson*, 508

U.S. at 38, 45. *Stinson* merely established that commentary that serves the "functional purpose" of an interpretive rule has the derivative authority of an interpretive rule. *Id.* at 42, 45; 1 Richard J. Pierce, *Administrative Law Treatise* §6.11 at 400 (4th ed. 2002) ("*Stinson* could be interpreted merely as a reaffirmation of long-standing principles [of administrative law].").[23]

Third, the Commission is authorized to issue "general policy statements regarding . . . aspect[s] of sentencing" other than application of the guidelines, *see* 28 U.S.C. §994(a)(2), including use of "the sentence modification provisions set forth in [§] 3582(c) of title 18." *Id.* §994(a)(2)(C). These "general policy statements" are equivalent to the APA's "general statements of policy." 5 U.S.C. §553(b). Since "a binding policy is an oxymoron," *Vietnam Veterans*, 843 F.2d at 537, when Congress authorized the Commission to issue "policy statements" regarding the "sentence modification provisions set forth in [§] 3582(c)," 28 U.S.C. §994(a)(2)(C), it plainly referred to nonbinding

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[23] To the extent this Court's decisions in *Williams* and *Stinson* contain language suggesting that policy statements (or Guidelines or commentary) have the independent binding force of law, this Court's subsequent decisions have abrogated any such suggestion. The *Stinson* Court, for example, stated that "[t]he principle that the Guidelines Manual is binding on federal courts applies as well to policy statements." 508 U.S. at 42 (citing *Williams*, 503 U.S. at 201). The *Williams* Court indicated that policy statements were binding by virtue of 18 U.S.C. §3553(b). *See* 503 U.S. at 196, 198, 200.

statements of policy. Likewise, when §3582(c)(2) directs judges to act consistently with those "policy statements," it refers to nonbinding statements of policy.

3. USSG §1B1.10(b)(2)(A) is not "commentary," nor does it in fact interpret or explain any guideline. Unlike the policy statement at issue in *Williams*, which was a "general policy statement[] regarding application of the guidelines," 28 U.S.C. §994(a)(2), *see* 503 U.S. at 200, section 1B1.10 is a "general policy statement[] regarding . . . any other aspect of sentencing," specifically, "the sentence modification provisions set forth in [§] 3582(c)." 28 U.S.C. §994(a)(2)(C). Although nominally a "policy statement," §1B1.10(b)(2)(A) purports to bind courts to substantive sentencing floors with the force of law. It purports to bind courts more firmly than even a guideline would have before *Booker* because it denies the courts any discretion to depart.[24] The ordinary

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[24] Section 1B1.10(b)(2)(B)'s allowance of a comparable reduction for previous recipients of downward "departures" is not available to most defendants. "Departures" are even more rare today than before *Booker*. *Compare* U.S. Sent'g Comm'n, Preliminary Quarterly Data Report, Fourth Quarter Release, tbl. 1 (2009) (3% departures), http://www.ussc.gov/sc_cases/USSC_2009_Quarter_Report_4th.pdf, *with* U.S. Sent'g Comm'n, Federal Sentencing Statistics by State, District and Circuit, tbl. 8 (2003) (7.5% departures), http://www.ussc.gov/JUDPACK/2003/1c03.pdf.

meaning of "policy statement" does not encompass a rule with such binding force.[25]

The Court should adhere to the term's ordinary meaning, and reject §1B1.10(b)(2)(A). The alternative interpretation would permit the Commission to dictate the scope of the courts' authority under a federal statute, situated in Title 18 and directed to the courts, simply because that statute includes the phrase "consistent with applicable policy statements." That alternative violates the plain meaning of the relevant statutes, and, as discussed in Part IV, would allow the Commission to exercise power "autocratically." Anthony, *Spurious Rules*, *supra*, at 3, 15.[26]

B. The legislative history confirms that "policy statements" are not binding.

The legislative history of the SRA supports the ordinary understanding of the term "policy statement." Congress intended that, unlike a sentence that is "inconsistent with the sentencing

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[25] Nor does the ordinary meaning of "interpretive rule" encompass such a rule.

[26] This Court has declined to accord the Commission any special deference in interpreting statutory directives to the Commission. *United States v. LaBonte*, 520 U.S. 751 (1997). Here, the Commission relies on its interpretation of 18 U.S.C. §3582(c)(2), a statute directed to judges, to curtail the power of judges under that statute, and bootstraps from that a novel interpretation of statutes meant to define its duties, *i.e.*, 28 U.S.C. §994(a)(2)(C) and (u). Under these circumstances, even a typical agency would receive no deference.

guidelines," a sentence that is "inconsistent with the policy statements" would not be subject to appeal. S. Rep. No. 98-225 at 167. By "policy statement," Congress meant an ordinary policy statement that a judge would "consult[ ]"when making a discretionary decision "in a particular case." *Id.* at 167-68.

The discussion of the particular policy statements applicable to §3582(c)(2) proceedings explains that such policy statements would merely guide the courts' considered and discretionary judgment:

> The bill, as reported, provides . . . in 18 U.S.C. §3583(c) [sic] for *court determination*, subject to *consideration* of Sentencing Commission *standards*, of the question *whether there is justification* for reducing a term of imprisonment in situations such as those described.

S. Rep. No. 98-225 at 55-56 (emphasis added).

These passages confirm that when Congress said that the court must act "consistent[ly] with applicable policy statements," §3582(c)(2), it did not intend for those "policy statements" to dictate the court's resentencing decision. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990) (emphasizing that while Congress mandated that the agency promulgate "*standards*" regarding a right of action under the statute, it did not thereby "empower the [agency] to regulate the scope of judicial power vested by the statute") (emphasis in original).

C. The ordinary meaning of "policy statement" should be used to ensure consistency within the Guidelines Manual.

Section 994(a)(2) is the primary provision authorizing the Commission to issue policy statements. It directs the Commission to issue "general policy statements regarding [1] application of the guidelines or [2] any other aspect of sentencing or sentence implementation that in the view of the Commission would further the purposes set forth in section 3553(a)(2)." 28 U.S.C. §994(a)(2). It specifically directs the Commission to issue general "policy statements" regarding the "appropriate use of" thirteen "other aspect[s] of sentencing or sentence implementation," including sentence modification under §3582(c)(2). *See* 28 U.S.C. §994(a)(2)(A)-(F).[27] Although the Commission has not issued policy statements for all thirteen situations, no policy statement it has issued pursuant to this direction, *other than* §1B1.10, purports to be binding.[28] Until its revision in 2008,

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[27] These are 18 U.S.C. §§3554 (criminal forfeiture), 3555 (notice to victims), 3556 (restitution), 3563(b) (discretionary conditions of probation) and 3583(d) (conditions of supervised release), 3563(c) (modification of conditions of probation), 3564 (modification of term of probation), 3573 (modification of a fine), 3582(c) (modification of term of imprisonment), 3572 (imposition of a fine); 3622 (temporary release of a prisoner), 3624(c) (prerelease custody), and plea agreements under Rule 11 of the Federal Criminal Rules of Procedure.

[28] *See* USSG §1B1.13, p.s. (in no way limiting the extent to which §3553(a) applies in considering motion for reduction in

(Continued on following page)

§1B1.10 likewise did not purport to be binding. *See* USSG §1B1.10(b) & comment. (n.3), p.s. (2007).

Similarly, while Congress authorized the Commission to promulgate either guidelines *or* policy statements regarding the provisions for revocation of probation or supervised release, *id.* §994(a)(3), the Commission elected to issue "policy statements only" that do not purport to be binding, *see* Ch. 7, Part A(1), and expressly recognized that policy statements are advisory only. *See id.* Part A(3)(a) ("At the outset, the Commission faced a choice between promulgating guidelines or issuing *advisory* policy statements for the revocation of probation and supervised release." (emphasis added)); *see also id.* Part B, p.s. Indeed, when the guidelines themselves were mandatory, every court of appeals held that the policy statements

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term of imprisonment under §3582(c)(1)); *id.* §5B1.3(c)-(e), p.s. ("recommend[ing]" conditions of probation and suggesting some that otherwise "may be appropriate on a case-by-case basis"); *id.* §5D1.2(b), p.s. ("recommend[ing]" statutory maximum term of supervised release for sex offenses); *id.* §5D1.3(c)-(e), p.s. ("recommend[ing]" conditions of supervised release and suggesting some that otherwise "may be appropriate on a case-by-case basis"); *id.* §6B1.1-6B1.4, p.s. ("These policy statements make clear that sentencing is a judicial function and that the appropriate sentence in a guilty plea case is to be determined by the judge."). Although the provisions relating to plea agreements contain some binding clauses, those clauses merely reiterate binding provisions of Rule 11. The Commission otherwise designated as "guidelines" those provisions that reiterate statutory provisions or are meant to bind. *See id.* §§5B1.3(a)-(b), 5D1.3(a)-(b), 5E1.1, 5E1.2, 5E1.4, 5F1.1, 5F1.2, 5F1.4, 5F1.8.

in Part B of Chapter 7 are advisory only,[29] because they do not interpret a guideline, but rather tell a judge "what to do after he has determined" the guideline range. *See United States v. Hill*, 48 F.3d 228, 231 (7th Cir. 1995). That is, the Chapter 7 policy statements "tell the district judge how to exercise his discretion in the area left open by the guidelines and the interpretive commentary on the guidelines," and "do not replace that discretion with a rule." *Id.*

Nothing in the language of §3582(c)(2) indicates that Congress expected the Commission, in exercising its duty under §994, to promulgate a "policy statement" to replace the court's discretion with a binding rule. Section 3582(c)(2) calls for a resentencing decision "consistent with applicable policy statements issued by the Sentencing Commission." Three of the other "aspect[s] of sentencing" particularly identified by §994(a)(2) likewise call for action "consistent with" the Commission's "policy statements," but, as mentioned, no policy statement purports to bind in those situations. *See* 18 U.S.C. §§3582(c)(1), 3582(c)(2), 3583(d), 3622;[30] *see* 28 U.S.C. §§994(a)(2)(B), (C), (F).

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[29] *See, e.g., United States v. Waters*, 84 F.3d 86, 89-90 & n.4 (2d Cir. 1996) (collecting cases); *United States v. George*, 184 F.3d 1119, 1121-22 (9th Cir. 1999).

[30] The Commission did not promulgate a policy statement for §3582(c)(1) until 2006, yet many prisoners were released early under that provision. *See* Written Testimony of Margaret Colgate-Love Before the U.S. Sentencing Comm'n on Behalf of the American Bar Association, at 14 n.7 (Mar. 15, 2006). It has never promulgated a policy statement for §3622.

Two of these three "consistent with" provisions are particularly pertinent. First, §3583(d), governing conditions of supervised release, provides a useful comparison. Like §3582(c)(2), it directs judges to take into account certain §3553(a) factors and to act "consistent[ly] with" the Commission's policy statements. Section 3583(d) directs that any condition of supervised release must be "reasonably related to" and "involve[ ] no greater deprivation of liberty than is reasonably necessary for" enumerated purposes and factors under §3553(a),[31] as well as "consistent with any pertinent policy statements issued by the Sentencing Commission." In exercising its duty under §994(a)(2)(B), the Commission has promulgated three policy statements regarding conditions of supervised release, and none purports to bind judges or to control the extent to which the enumerated factors apply in a given case. *See* USSG §5D1.3(c), (d), (e), p.s. Courts of appeals routinely affirm conditions of supervised release that stray from the express terms of a policy statement directly addressing the issue where the condition was nevertheless reasonably related to the enumerated factors and purposes set forth in §3553(a).[32] In short, the requirement that a condition be "consistent with" the policy statement does not

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[31] 18 U.S.C. §3583(d)(1)-(2).

[32] *See, e.g.*, *United States v. McKissic*, 428 F.3d 719, 723 (7th Cir. 2005) (upholding total ban on alcohol as reasonably related to the §3553(a) factors, though policy statement recommends only "no excessive use").

negate the sentencing court's equal duty to reasonably conform the condition to §3553(a) factors.

Second, perhaps the most apt comparison is between §3582(c)(2) and its neighbor, §3582(c)(1), which allows a district court to reduce a prisoner's sentence due to age or "extraordinary and compelling reasons." Both provisions give the district courts and the Commission a job that, before the Guidelines, the courts and Parole Commission performed. S. Rep. No. 98-225 at 55-56 (1983). Both provisions give the correctional system necessary flexibility through a type of "safety valve" allowing for post-sentencing review and reduction of a term of imprisonment. *Id.* at 121. And both use the very same phrasing – "after considering the factors set forth in §3553(a) to the extent that they are applicable" and that such reduction be "consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. §3582(c)(1), (2). With respect to §3582(c)(1), the Commission has issued a policy statement that neither purports to be binding nor attempts to control the extent to which §3553(a) factors apply. USSG §1B1.13, p.s.

Finally, another kind of policy statement, regarding neither application of particular guidelines nor other aspects of sentencing specifically listed in §994(a)(2), does not bind the courts. Although the policy statements in Chapter 5, Parts H and K still prohibit "departure" except in "specific, limited cases," *Booker*, 543 U.S. at 234, judges may conclude that these provisions "do not generally treat certain

defendant characteristics in the proper way" or reflect "an unsound judgment." *Rita v. United States*, 551 U.S. 338, 357 (2007); *see Gall v. United States*, 552 U.S. 38, 41-44, 57-58 (upholding below guideline sentence based on factors the Commission's "policy statements" deem never or not ordinarily relevant).

In sum, the Commission wrongly assumed that the final clause of §3582(c)(2) invited it to issue a "policy statement" with the binding force of law. This assumption is inconsistent with the plain meaning of "policy statement," the legislative history, and the other policy statements in the Guidelines Manual. Allowing the Commission the power to issue binding "policy statements" for use in §3582(c)(2) proceedings would be a complete anomaly. If the Court, by eschewing the ordinary meaning of "policy statement," were to permit that extraordinary power, the Commission would hereafter issue nonbinding legislative rules (*i.e.*, guidelines) through the notice and comment procedure, while issuing binding policy statements exempt from notice and comment.

IV. Revised §1B1.10(b)(2)(A) Is Invalid Because It Was Issued Without Proper Notice and Comment.

Revised §1B1.10(b)(2)(A) would be invalid even if the Court were to find that the Commission had the authority to issue a binding rule equivalent in substance to it, and that §3582(c)(2) required judges to follow it. That is so because, when the Commission

issues binding rules, it must satisfy "the notice and comment requirements of [section 553 of] the Administrative Procedure Act." *Mistretta*, 488 U.S. at 394; *see* 28 U.S.C. §994(x). Section 1B1.10(b)(2)(A) purports to bind courts with the force of law, but the Commission failed to give notice or seek comment before issuing it.[33]

Section 553 of the APA requires an agency to include in its notice of proposed rulemaking "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. §553(b)(3). Notice fails this requirement if it consists of "ambiguous comments and weak signals" as to the proposed rule's substance. *Int'l Union v. Mine Safety and Health Admin.*, 407 F.3d 1250, 1261 (D.C. Cir. 2005) (internal quotation marks omitted). Unless, due to the agency's notice, "interested parties should have anticipated" that the final rule was under consideration, the notice is inadequate and the rule invalid. *Id.* (internal quotation marks

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[33] The Commission's view that it has the power to issue policy statements that are binding, yet exempt from the notice and comment requirement, *see* U.S. Sent'g Comm'n, Rules of Practice and Procedure 4.3 (2007), is indefensible. Other agencies are denied such power, *see Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993) (collecting examples); the SRA has expressly denied the Commission that power in promulgating Guidelines, 28 U.S.C. §994(x); and the Commission's survival of a separation of powers challenge was due in part to the notice and comment requirement. *See Mistretta*, 488 U.S. at 394; *see generally United States v. Handy*, 570 F. Supp. 2d 437, 467-68 (E.D.N.Y. 2008).

omitted). When notice is inadequate, the agency cannot "bootstrap" notice from subsequent public comment because "notice necessarily must come – if at all – from the Agency." *Horsehead Res. Dev. Co. v. Browner*, 16 F.3d 1246, 1268 (D.C. Cir. 1994) (internal quotation marks omitted).

The Commission's notice did not state "either the terms or substance" of a proposed amendment to §1B1.10.[34] 5 U.S.C. §553(b)(3). Nor did it provide an adequate "description" of the "subjects and issues involved." *Id.* It led interested parties to anticipate only an amendment that may offer "guidance" as to the "procedure" for applying an amendment retroactively, and, specifically, the procedure to be used if the crack amendment was given retroactive effect. 72 Fed.Reg. 41,794, 41,795 (July 31, 2007). The amendment to §1B1.10(b) went far beyond the scope of that notice. It fundamentally changed §1B1.10(b) from advisory guidance to a binding rule. It did not address "procedure," but created new substantive sentencing floors. Though the notice gave no hint of any such intention, the Commission amended §1B1.10(b) to dictate an answer to the question that is now before this Court.[35] That a professor appeared

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[34] The only portion of the amended rule that was properly published for comment was the addition of the crack amendments to subsection (c) of §1B1.10.

[35] "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 1 Cranch 137, 177 (1803). The Commission is "not a court and does not exercise judicial power." *Mistretta*, 488 U.S. at 384-85.

at the public hearing and proposed an "absolute" yet possibly advisory sentencing floor does not compensate for the failure of the Commission to give notice of its overhaul of §1B1.10(b). *Horsehead Res. Dev. Co.*, 16 F.3d at 1268. Because of that failure, the new rule is invalid.

CONCLUSION

This Court should reverse the judgment of the court of appeals and remand for resentencing absent the sentencing floor that §1B1.10(b)(2)(A) purports to set.

Respectfully submitted,

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AMICUS CURIAE BRIEF

No. 09-6338

IN THE
Supreme Court of the United States

PERCY DILLON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE UNITED STATES SENTENCING COMMISSION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address the following question:

Whether, in a sentence reduction proceeding under 18 U.S.C. § 3582(c)(2), the district court has authority to reduce a sentence of imprisonment in a manner inconsistent with the United States Sentencing Commission's policy statement at § 1B1.10 of the Guidelines Manual.

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INTEREST OF *AMICUS CURIAE*[1]

The Sentencing Reform Act of 1984 ("SRA") charged the United States Sentencing Commission (the "USSC" or the "Commission") with the duty to create, review, and revise the Federal Sentencing Guidelines ("Guidelines"), 28 U.S.C. §§ 991-994, and "granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u)." *Braxton v. United States*, 500 U.S. 344, 348 (1991). The Commission accordingly has a direct interest in this case, which concerns sentence modification proceedings conducted in response to its decision to make an amendment to the Guidelines retroactive. The Commission previously submitted briefs in this Court as *amicus curiae* on issues of paramount importance to the Commission's mission and functions in *Rita v. United States*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005); and *Mistretta v. United States*, 488 U.S. 361 (1989).

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amicus* represents that it authored this brief and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel for *amicus* represents that counsel for all parties have consented to the filing of this brief, and letters reflecting their consent have been filed with the Clerk.

STATEMENT

A. The Commission's Amendment To The Guidelines Applicable To Crack Cocaine Offenses

Under the SRA, the Commission is charged with "establishing sentencing policies and practices" that "provide certainty and fairness in meeting the purposes of sentencing." 28 U.S.C. § 991(b)(1)(B). The SRA directs the Commission to ensure that federal sentencing policies "reflect . . . advancement in knowledge of human behavior as it relates to the criminal justice process" and to measure the effectiveness of sentencing practices in meeting the purposes of sentencing. *Id.* § 991(b)(1)(C). The Commission accordingly has the obligation periodically to "review and revise" the Guidelines "in consideration of comments and data coming to its attention." *Id.* § 994(*o*). The Commission must submit to Congress its amendments to the Guidelines; the amendments are subject to disapproval by Congress for 180 days, after which time they take effect. *See id.* § 994(p).

The amendment to the Guidelines at issue in this case concerns offenses involving crack cocaine. *See* USSG App. C, amend. 706 (effective Nov. 1, 2007). Under the Anti-Drug Abuse Act of 1986, Congress set mandatory minimum penalties for crack cocaine (or "cocaine base") offenses that "treated every gram of crack cocaine as the equivalent of 100 grams of powder cocaine." *Kimbrough v. United States*, 552 U.S. 85, 95-96 (2007). The Commission initially incorporated that "100-to-1" ratio into the Guidelines, but, based on further research and study, came to the view that the extent of this disparate treatment was

no longer supportable.[2] In the absence of any legislative action by Congress, in 2007, the Commission adopted an amendment that reduced the base offense level for most crack cocaine offenders by two levels. *See* USSG App. C, amend. 706 (effective Nov. 1, 2007).

B. The Commission's Determination To Make The Crack Cocaine Amendment Retroactive

1. When a Guideline amendment "reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," the SRA requires that the Commission "specify in what circumstances and by what amount" the sentences of prisoners serving terms of imprisonment for those offenses should be lowered. 28 U.S.C. § 994(u). Section 1B1.10 of the Guidelines Manual implements that directive and provides that a sentence reduction is appropriate only if one of the amendments "listed in subsection (c) [of § 1B1.10] is applicable to the defendant" and "ha[s] the effect of lowering the defendant's applicable guideline range." USSG § 1B1.10(a)(2). Section 1B1.10(c) thus identifies those amendments that the Commission has determined, pursuant to § 994(u), should be applied retroactively.

Section 1B1.10 also explains the criteria that the Commission uses for deciding whether to give an

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[2] *See* USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995), *available at* http://www.ussc.gov/crack/exec.htm; USSC, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997), *available at* http://www.ussc.gov/r_congress/newcrack.pdf; USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2002), *available at* http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf; USSC, *Report to the Congress: Cocaine and Federal Sentencing Policy* (May 2007), *available at* http://www.ussc.gov/r_congress/cocaine2007.pdf.

amendment retroactive effect. Those criteria include "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range." *Id.* § 1B1.10 cmt. background. In considering the difficulty of applying an amendment retroactively, the Commission considers not only how difficult applying the amendment would be in an individual case, but also the overall impact of a potential retroactivity decision on the federal criminal justice system.

To inform the Commission's deliberations, particularly with respect to that third enumerated factor, the Commission typically performs an analysis that estimates the number of offenders potentially eligible to seek a reduced sentence if the Commission were to make the amendment retroactive. It then projects release dates for those eligible offenders.[3] Using those criteria, the Commission has exercised its authority to make an amendment retroactive judiciously. Prior to *Booker*, the Commission had voted to apply only 24 of its amendments retroactively.

2. Following its submission of the crack cocaine amendment to Congress, the Commission published a Federal Register notice seeking public comment on whether the amendment should be given retroactive effect. *See* 72 Fed. Reg. 41,794 (July 31, 2007). Cognizant of the potential impact that Amendment 706 could have on the federal criminal justice system if applied retroactively, the Commission also requested comment regarding "whether, if it amends § 1B1.10(c)

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[3] *See, e.g.*, USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008); *see also* USSC Rules of Practice and Procedure 4.1 (2007).

to include [the crack cocaine] amendment, it also should amend § 1B1.10 to provide guidance to the courts on the procedure to be used when applying an amendment retroactively under 18 U.S.C. 3582(c)(2)." *Id.*

The Commission received "more than 33,000 pieces of public comment concerning the issue of retroactivity," representing each of the major participants in the federal criminal justice system.[4] Although many comments favored making the amendment retroactive, they also reflected concern for the procedures that would apply in the event of retroactive application. As the Committee on Criminal Law of the Judicial Conference of the United States stated: "[t]he Committee's recommendation [in favor of retroactive application of the crack cocaine amendment] rests on the hope that the Commission will implement procedures to reduce the administrative burden on the federal judiciary associated with the resentencings that would attend retroactive application."[5]

In addition to soliciting public comment, the Commission held a full-day hearing in Washington, D.C., where it heard testimony from many participants in the federal criminal justice system, including the judicial branch, representatives of the executive branch, private practitioners and representatives of federal public defenders, academics, and various community groups.

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[4] U.S. Sentencing Commission Public Meeting Minutes at 6 (Dec. 11, 2007), *available at* http://www.ussc.gov/MINUTES/20071211_Minutes.pdf.

[5] Letter from Hon. Paul Cassell, Chair, Committee on Criminal Law, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 1 (Nov. 2, 2007) ("Cassell Letter"), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_004.pdf.

3. The Commission also analyzed and considered the potential impact on the prison population and the federal court system of applying the crack cocaine amendment retroactively.[6] The Commission's analysis was based expressly on its understanding of "the constraints imposed by 18 U.S.C. § 3582(c)(2) and § 1B1.10" limiting "the extent of any reduction under § 3582(c)(2) to the amended guideline range." Schmitt Memorandum at 4. Accordingly, the data considered by the Commission when it voted on retroactivity of the crack cocaine amendment "account[ed] only for the application of the two-level reduction provided by the crack cocaine amendment and [did] not assume any other reduction in the sentence." *Id.*

The Commission's analysis estimated that, of the 31,323 crack cocaine offenders sentenced between October 1, 1991, and June 20, 2007, and who were identified as imprisoned, 19,500 "would be eligible to seek a reduced sentence if the Commission were to make the 2007 crack cocaine amendment retroactive" and that "[t]hese offenders would be released over a period of more than three decades." *Id.* at 4-5. Further, the Commission estimated that "the average sentence reduction for those offenders who appear to be eligible to seek a reduced sentence would be 27 months (from 152 months to 125 months)." *Id.* at 23.

4. After considering the data and public input, the Commission voted on December 11, 2007, to give the crack cocaine amendment retroactive effect as of March 3, 2008. *See* USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008). The

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[6] *See* Memorandum from Glenn Schmitt et al., USSC, to Hon. Ricardo H. Hinojosa, Chair, USSC (Oct. 3, 2007) ("Schmitt Memorandum"), *available at* http://www.ussc.gov/general/Impact_Analysis_20071003_3b.pdf.

Commission also voted to amend § 1B1.10 to "clarify when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. § 3582(c)(2)." *Id.*, amend. 712, Reason for Amendment (effective Mar. 3, 2008).

5. Since its decision to make the crack cocaine amendment retroactive, the Commission has compiled "data concerning recent court decisions considering motions to reduce the length of imprisonment for certain offenders convicted of offenses involving crack cocaine prior to November 1, 2007."[7] As of January 13, 2010, district courts had addressed and decided 23,471 motions brought under 18 U.S.C. § 3582(c)(2) during the approximately 22 months that the amendment had been in effect. *See* 2010 Report, Table 1. Of those 23,471 motions, district courts had granted 15,501 sentence reductions pursuant to the Commission's crack cocaine amendment and denied an additional 7,970 such motions. *See id.*[8] The average reduction in sentence was 25 months, compared to the 27 months the Commission had projected. *See id.*, Table 8.

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[7] USSC, *Preliminary Crack Cocaine Retroactivity Data Report* 1 (Jan. 2010) ("2010 Report"), *available at* http://www.ussc.gov/USSC_Crack_Retroactivity_Report_2010_January.pdf.

[8] Of those 7,970 motions, 6,763 were denied because the defendant was not eligible for a sentence reduction; 944 of those motions were brought by defendants whose offense(s) did not involve crack cocaine. *See id.*, Table 9.

SUMMARY OF ARGUMENT

I.A. Under 28 U.S.C. § 994(u), if the Commission reduces the recommended Guideline range applicable to a certain offense, it must "specify in what circumstances and by what amount" those sentences should be reduced for those serving terms of imprisonment for that offense. The Commission's policy statement at § 1B1.10 of the Guidelines Manual carries out those tasks by providing that a court may grant a sentence reduction under a Guideline amendment only if the Commission has designated that amendment as appropriate for retroactive application ("in what circumstances") and that a court may not reduce a defendant's sentence below the amended Guideline range ("by what amount"). *Amici*'s various arguments that courts are free to regard those limitations as non-binding are unpersuasive and contradicted by the express terms of 28 U.S.C. § 994(u) and 18 U.S.C. § 3582(c)(2).

B. The Commission properly adhered to procedural requisites in formulating its decision. The Commission correctly forecast the thousands of requests for sentence modification that have been filed in response to the retroactive effect of the crack cocaine amendment. The Commission's amendments to § 1B1.10 were adopted to clarify any ambiguities in the policy statement that could lead to unnecessary litigation and confusion, and in turn could hinder the federal courts' ability to process the cases and to release those prisoners who would benefit from retroactive application of the amendment.

In amending § 1B1.10, the Commission was not required to use the notice-and-comment procedures of the Administrative Procedure Act ("APA"), 5 U.S.C. § 553. The Commission's organic statute is clear

that the APA applies only to promulgation of Guidelines and that the Commission should implement its authority under 18 U.S.C. § 3582(c)(2) through promulgation of a policy statement. Nevertheless, the Commission sought and received public comment on the changes to § 1B1.10 using the same procedures through which it obtained public comment on the crack cocaine amendment itself. Furthermore, the revisions merely clarified the appropriate circumstances for sentence modifications.

II. A significant factor in the Commission's consideration of whether to make a Guideline amendment retroactive is the effect retroactivity would have on the court system's ability to administer justice. Because courts of appeals have generally treated sentence reduction proceedings under 18 U.S.C. § 3582(c)(2) as having a limited scope that does not entail a complete resentencing, the Commission has been able to predict with a high degree of accuracy what consequences to the judicial system are likely to flow from retroactive treatment of specific Guideline amendments. That assessment would be extremely difficult, if not impossible, to conduct if the Commission could not reasonably predict the extent of the reduction that could be granted to an eligible defendant or the nature and extent of the resulting proceedings. The regime that petitioner seeks – in which any amendment made retroactive would potentially afford each eligible defendant a full resentencing – likely would have the effect of diminishing retroactivity's usefulness as a tool for promoting fairness in sentencing and avoiding unwarranted disparities.

ARGUMENT

I. THE COMMISSION PROPERLY CARRIED OUT ITS STATUTORY DUTIES UNDER 28 U.S.C. § 994(u) BY PROMULGATING THE POLICY STATEMENT AT USSG § 1B1.10

By its terms, § 3582(c)(2) grants a district court authority to reduce a sentence only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." 18 U.S.C. § 3582(c)(2). The Commission joins in respondent's arguments as to why applying § 3582(c)(2) as written is consistent with the Sixth Amendment and this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005).[9] The Commission will address here certain of the non-constitutional, alternative arguments advanced by the Federal Defenders as *Amici Curiae*

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[9] That is the "nearly unanimous position" of the courts of appeals, which have held that "*Booker* does not alter the mandatory character of Guideline § 1B1.10's limitations on sentence reductions." *United States v. Doublin*, 572 F.3d 235, 238 (5th Cir.) (per curiam), *cert. denied*, 130 S. Ct. 517 (2009); *see also United States v. Fanfan*, 558 F.3d 105, 109-10 (1st Cir.), *cert. denied*, 130 S. Ct. 99 (2009); *United States v. Savoy*, 567 F.3d 71, 73 (2d Cir.) (per curiam), *cert. denied*, 130 S. Ct. 342 (2009); *United States v. Doe*, 564 F.3d 305, 313-14 (3d Cir.), *cert. denied*, 130 S. Ct. 563 (2009); *United States v. Dunphy*, 551 F.3d 247, 252-55 (4th Cir.), *cert. denied*, 129 S. Ct. 240 (2009); *United States v. Cunningham*, 554 F.3d 703, 706-07 (7th Cir.), *cert. denied*, 129 S. Ct. 2826, 2840 (2009); *United States v. Starks*, 551 F.3d 839, 841-42 (8th Cir.), *cert. denied*, 129 S. Ct. 2746 (2009); *United States v. Rhodes* 549 F.3d 833, 839-41 (10th Cir. 2008), *cert. denied*, 129 S. Ct. 2052 (2009); *United States v. Melvin*, 556 F.3d 1190, 1192-93 (11th Cir.), *cert. denied*, 129 S. Ct. 2382 (2009). *But see United States v. Hicks*, 472 F.3d 1167, 1169-72 (9th Cir. 2007). In *United States v. Fox*, 583 F.3d 596 (9th Cir. 2009), the Ninth Circuit granted initial hearing en banc to consider whether to overrule *Hicks*; that review has been stayed pending the Court's resolution of this case.

in Support of Petitioner ("*Amici*"). *Amici*'s arguments are unpersuasive.

A. Section 1B1.10 Specifies "In What Circumstances" And "By What Amount" Sentences May Be Reduced Based On A Guideline Amendment

1. Section 994(u) specifically directs that, "[i]f the Commission reduces the term of imprisonment recommended in the guidelines applicable to a particular offense or category of offenses," the Commission "shall specify in what circumstances and by what amount the sentences of prisoners serving terms of imprisonment for the offense may be reduced." 28 U.S.C. § 994(u). In response to that directive, the Commission promulgated § 1B1.10.

Section 1B1.10(a) specifies "in what circumstances" (28 U.S.C. § 994(u)) an amendment may be applied retroactively, by providing that a defendant is eligible for a § 3582(c)(2) reduction only if an "amendment[] listed in subsection (c) [of § 1B1.10] is applicable to the defendant" and "ha[s] the effect of lowering the defendant's applicable guideline range." USSG § 1B1.10(a)(2). Section 1B1.10(c) lists those amendments that the Commission has determined are appropriate for retroactive application. Petitioner and his *Amici* do not dispute that § 1B1.10 is binding in this respect – a court is not free to grant a sentence reduction under § 3582(c)(2) based on an amendment to the Guidelines that the Commission has not listed in § 1B1.10(c).

Section 1B1.10(b) specifies, in conjunction with the substantive amendment itself, "by what amount" (28 U.S.C. § 994(u)) the amendment should be given retroactive effect. Section 1B1.10(b)(2)(A) provides generally that "the court shall not reduce the defen-

dant's term of imprisonment . . . to a term that is less than the minimum of the amended guidelines range," as determined with the benefit of the amendment. Section 1B1.10 thus carries out precisely what § 994(u) directs the Commission to do when a Guideline amendment has the effect of reducing the recommended sentencing range for an offense or category of offenses.

2. Despite that direct relationship, *Amici* argue that the Commission's authority under § 994(u) is merely a "supplement" to its authority to amend the Guidelines under § 994(*o*) and that § 994(u) does not confer on the Commission any authority to issue policy statements that are "applicable" under the last clause of § 3582(c)(2). *Amici* Br. 14-19. In short, *Amici* acknowledge (at 18-19) that the Commission is authorized to "specify" in what circumstances and by what amount an amendment shall have retroactive effect, but argue that the Commission lacks authority to make such a specification in a way that matters – through a "policy statement" that is "applicable" under § 3582(c)(2). The argument thus implies that, in § 994(u), Congress charged the Commission with a pointless duty. That construction is untenable.

Any suggestion that § 1B1.10 does not *implement* § 994(u) is foreclosed by this Court's decision in *Braxton v. United States*, 500 U.S. 344 (1991). As this Court explained, "Congress has granted the Commission the unusual explicit *power* to decide whether and to what extent its amendments reducing sentences will be given retroactive effect, 28 U.S.C. § 994(u). This power *has been implemented in USSG § 1B1.10*, which sets forth the amendments that justify sentence reduction." *Id.* at 348 (second emphasis added). Although § 1B1.10 has been amended

since *Braxton*, it was then – and is now – a "policy statement," which is "applicable" under § 3582(c)(2).

3. *Amici* next make the (seemingly contradictory) argument that, *because* § 1B1.10 is a policy statement, it cannot be binding on district courts under § 3582(c)(2). *Amici* point out that § 994(a)(2)(C) expressly authorizes the Commission to issue policy statements regarding, among other issues, "the sentence modification provisions set forth in section[] . . . 3582(c) of title 18," 28 U.S.C. § 994(a)(2)(C), and contend that, because certain other of the policy statements authorized by § 994(a)(2) are "non-binding," § 1B1.10 should be regarded as non-binding by association. *Amici* Br. 27-29. That argument is similarly unpersuasive.

Although petitioner's *Amici* are correct that § 994(a)(2) authorizes the Commission to issue policy statements regarding a number of other statutory provisions, § 3582(c)(2) is unique in expressly requiring a court to act "consistent with" those policy statements. The binding nature of § 1B1.10 thus comes not from § 994(a)(2), but from § 3582(c)(2) itself.

Amici seek to avoid § 3582(c)(2)'s consistency requirement by re-writing it. *Amici* suggest (at 12) that Congress must have contemplated that the policy statements referenced in § 3582(c)(2) would contain only general "guidance in the exercise of discretion," rather than any specific binding directives. In *Amici*'s view, therefore, "consistent with" can be read to require merely that the court "consider" the Commission's policy statements, as would be the case under 18 U.S.C. § 3553(a). But Congress expressly directed the Commission to "*specify* in what circumstances and *by what amount*" an otherwise final sen-

tence could be reduced. 28 U.S.C. § 994(u) (emphases added). That directive clearly instructed the Commission to supply concrete and binding limits on a district court's discretion to reduce a sentence. Moreover, had Congress intended the court only to "consider" the Commission's policy statements, it knew how to say so. Section 3582(c)(2) requires a court to "consider[] the factors set forth in section 3553(a) to the extent that they are applicable." 18 U.S.C. § 3582(c)(2). But Congress chose instead to make *consistency* with the Commission's policy statements a condition to the court's power to act regarding sentence reductions: a court may grant a reduction only "if such a reduction is consistent with applicable policy statements issued by the Sentencing Commission." *Id.*

B. *Amici*'s Procedural Challenge To § 1B1.10 Has No Merit

Amici's final argument is that § 1B1.10 is invalid because the Commission failed to comply with the notice-and-comment provisions of the APA, 5 U.S.C. § 553. That argument fails for at least three reasons.

1. Because § 1B1.10 is a policy statement, rather than a Guideline, notice-and-comment procedures were not required when the statement was amended in 2007. The Commission's organic statute, 28 U.S.C. § 994(x), makes clear that "[t]he provisions of section 553 of title 5, relating to publication in the Federal Register and public hearing procedure," are applicable only "to the promulgation of guidelines pursuant to this section," not to the issuance of policy statements. By *Amici*'s own argument, the Commission's amendments to § 1B1.10 are not "guidelines" and therefore are not subject to the notice-and-comment requirements of the APA.

2. Although in no way required, the Commission nevertheless sought and received public comment on changes to § 1B1.10 during its retroactivity deliberations. Consistent with its Rules of Practice and Procedure, the Commission twice requested public comment on possible changes to § 1B1.10 that would prevent motions seeking sentence reductions under the amended Guideline from unnecessarily burdening the courts and the probation system. The Commission received comment on possible changes from a variety of groups and individuals in the federal criminal justice system. As noted, the Committee on Criminal Law of the Judicial Conference of the United States recommended that the Commission give the crack cocaine amendment retroactive application and urged the Commission to "implement procedures to reduce the administrative burden on the federal judiciary." Cassell Letter at 1. In particular, the Committee emphasized its view that "a defendant's presence is *not* required for a reduction of sentence under 18 U.S.C. § 3582(c)" and that the reduction "could be a simple, clerical procedure." *Id.* at 5.

Contrary views were expressed as well. For example, the Practitioners Advisory Group, one of the Commission's standing advisory groups, stated that "motions under section 3582(c)(2) are uniquely committed to the discretion of the courts" and, as such, "it would be better to leave the courts with the greatest possible flexibility in applying section 1B1.10."[10] The Federal Public and Community Defenders also weighed in on the issue, recommending

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[10] Letter from David Debold and Todd Bussert, Co-Chairs, Practitioners Advisory Group, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 4 (Oct. 31, 2007), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_002.pdf.

only that the Commission "include in the commentary to § 1B1.10 a general recommendation that courts should at least reduce each eligible defendant's offense level by two levels in accordance with the amendment and to the extent consistent with § 3582(c)."[11] In their view, any other changes that would "provide specific guidance to courts in applying the amendment – or to limit its applicability in any way – would intrude upon the district court's statutory authority."[12] Indeed, contrary to *Amici*'s argument, every interested party, including *Amici* themselves, had the opportunity to provide comment and in fact did so.

The Commission took all of those views into account in adopting the 2007 amendments to § 1B1.10. To the extent notice-and-comment procedures were required, the Commission satisfied any such obligation here.

3. More fundamentally, the 2007 revisions to § 1B1.10 did not require notice-and-comment procedures because they did not alter the substance of that provision. Rather, the 2007 amendments "clarif[ied] when, and to what extent, a reduction in the defendant's term of imprisonment is consistent with the policy statement and is therefore authorized under 18 U.S.C. § 3582(c)(2)." USSG App. C, amend. 712, Reason for Amendment (effective Mar. 3, 2008). In large measure, those changes consisted of moving existing language from the "commentary" section

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[11] Letter from Jon M. Sands, Federal Public and Community Defenders, to Hon. Ricardo H. Hinojosa, Chair, USSC, at 10 (Oct. 31, 2007), *available at* http://www.ussc.gov/pubcom_Retro/PC200711_003.pdf.

[12] *Id.*

into the body of the policy statement itself for ease of reference.

A comparison of the amended version of § 1B1.10 with the prior version of the policy statement on a provision-by-provision basis demonstrates the Commission's intent to clarify the application of the policy statement. Each of the critical portions of the policy statement that affects the extent of the reduction available to an eligible defendant has a substantially equivalent predecessor in the previous version of § 1B1.10. In particular, the provision at issue here that limits the available reduction to the minimum of the amended Guideline range, § 1B1.10(b)(2)(A), effective March 3, 2008, provides:

> Except as provided in subdivision (B), the court shall not reduce the defendant's term of imprisonment under 18 U.S.C. § 3582(c)(2) and this policy statement to a term that is less than the minimum of the amended guideline range determined under subdivision (1) of this subsection.

The 2007 version of § 1B1.10 contained the following statement in the commentary at Application Note 3:

> Under subsection (b), the amended guideline range and the term of imprisonment already served by the defendant limit the extent to which an eligible defendant's sentence may be reduced under 18 U.S.C. § 3582(c)(2).

There is no substantive difference between the statement that the amended Guideline limits the permitted reduction and the statement that a court may not reduce a sentence below the amended Guideline range. Because the prior version of § 1B1.10 also would have prevented the district court from reducing petitioner's sentence below the amended Guide-

line range, *see United States v. Hasan*, 245 F.3d 682, 686 (8th Cir. 2001) (en banc) (interpreting prior version of § 1B1.10 to limit "the relief which can be given to a prisoner at a § 3582(c)(2) resentencing" to the amended Guideline range unless a departure had been granted at the original sentencing), *Amici*'s procedural challenge to the 2007 amendments fails.

II. THE LIMITED SCOPE OF § 3582(c)(2) PROCEEDINGS PERMITS THE COMMISSION TO MAKE INFORMED RETROACTIVITY DECISIONS

A. Given the extraordinary nature of the remedy and the impact it has on the finality of sentences, the Commission exercises its authority regarding retroactivity with great care. The Commission has articulated three primary factors it considers when assessing whether a particular amendment should be applied retroactively: "the purpose of the amendment, the magnitude of the change in the guideline range made by the amendment, and the difficulty of applying the amendment retroactively to determine an amended guideline range." USSG § 1B1.10 cmt. background.

The last two factors take into account any burdens that might be imposed on the judicial system. As noted in the Senate report on the SRA, frequent grants of retroactivity to small changes in the Guidelines could present a burden to the judicial system.[13] A difficult calculation not only can increase the burden on courts as to the decision required in each individual case, but also can lead to a large number of motions from ineligible defendants because of un-

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[13] *See* S. Rep. No. 98-225, at 180 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3363.

certainty as to which defendants are eligible to seek a reduction under § 3582(c)(2).

In exercising its authority under § 994(u), the Commission carefully considers such possible effects in conjunction with the purpose of the amendment. With regard to the crack cocaine amendment, the Commission estimated that almost 20,000 defendants would be eligible for retroactive application of the crack cocaine amendment. The Commission nonetheless decided that retroactive application was appropriate because (among other reasons) "the magnitude of the change in the guideline range, i.e., two levels, is not difficult to apply in individual cases" and because "the Commission received persuasive written comment and testimony . . . that the administrative burdens of applying Amendment 706 retroactively are manageable." USSG App. C, amend. 713, Reason for Amendment (effective Mar. 3, 2008). The Commission's estimates of these impacts have proved remarkably accurate. As noted, the Commission projected that 19,500 offenders would be eligible for the reduction, and 15,501 sentence reductions have been granted thus far; the average reduction has been 25 months, compared to the 27 the Commission predicted. *See* 2010 Report, Tables 1, 8; Schmitt Memorandum at 4-5, 23. Moreover, the clarity of § 1B1.10's limitations on eligibility for, and the extent of, any reduction assisted the courts in disposing of 6,763 motions by defendants who did not qualify for a sentence reduction. *See* 2010 Report, Table 9.

B. The Commission's analysis of the effects of retroactivity was based on the Commission's view that § 1B1.10 would continue to apply as written – *i.e.*, defendants would get the benefit of the new amendment, but no other aspects of their sentences

would be subject to review. In that respect, the Commission relied on the near-consensus of circuit precedent regarding § 3582(c)(2) proceedings, which has long held that sentence modifications under that statute are not a "do-over of an original sentencing proceeding." *United States v. Legree*, 205 F.3d 724, 730 (4th Cir. 2000) (internal quotation marks omitted).[14]

In particular, the defendant has no right to a hearing and no right to be present in court for the sentence modification. *See id.*; *United States v. Edwards*, No. 97-60326, 1998 WL 546471, at *3 (5th Cir. Aug. 6, 1998) (judgment noted at 156 F.3d 182 (table)); *see also* Fed. R. Crim. P. 43(b)(4) ("A defendant need not be present [when] . . . [t]he proceeding involves the correction or reduction of sentence under Rule 35 or 18 U.S.C. § 3582(c).").

Nor does the Sixth Amendment right to counsel extend to such proceedings. *See United States v. Townsend*, 98 F.3d 510, 512 (9th Cir. 1996) (per curiam); *see also Legree*, 205 F.3d at 730 (holding that due process did not require court to appoint counsel or hold a hearing to resolve § 3582(c)(2) motion); *United States v. Tidwell*, 178 F.3d 946, 949 (7th Cir. 1999) ("The judge can appoint counsel for a movant, but need not do so."); *United States v. Whitebird*, 55 F.3d 1007, 1011 (5th Cir. 1995) (holding that 18 U.S.C. § 3006A(c) did not entitle a defendant to appointed counsel for purposes of filing a § 3582(c)(2)

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[14] *See also, e.g., United States v. Bravo*, 203 F.3d 778, 781 (11th Cir. 2000) ("[A] sentencing adjustment undertaken pursuant to Section 3582(c)(2) does not constitute a de novo resentencing."); *United States v. Jordan*, 162 F.3d 1, 4 (1st Cir. 1998) ("To the extent that [the defendant] is arguing that . . . there is fully *de novo* resentencing under § 3582(c)(2), that is surely wrong.").

motion); *United States v. Reddick*, 53 F.3d 462, 464 (2d Cir. 1995) (same).

C. These (and similar) considerations make § 3582(c)(2) proceedings quite different from plenary sentencing proceedings. The flexibility attendant to such § 3582(c)(2) proceedings significantly reduces the systemic burdens the Commission must weigh in considering whether to make an amendment retroactive. The narrowly limited scope of § 3582(c)(2) proceedings also enables the Commission to evaluate more accurately the effects of deciding to make an amendment retroactive.

The dramatic expansion and alteration in the scope of § 3582(c)(2) proceedings sought by petitioner would shift that balance in important ways. Accurate assessments about the effects of retroactivity decisions would be very difficult, if not impossible, for the Commission to make. And increased uncertainty as to the likely effects of making an amendment retroactive would weigh against making Guideline amendments retroactive in the future. Thus, as respondent correctly points out, the consequence of the regime that petitioner seeks "would be to diminish Section 3582(c)(2)'s value as a mechanism for granting leniency to defendants who, like petitioner, would seek the benefit of the Sentencing Commission's decision to lower Guidelines ranges." Resp. Br. 37.

For the foregoing reasons, and for those stated in the Brief for the United States, the Court should hold that a district court's exercise of discretion to reduce an otherwise final sentence must be consistent with 18 U.S.C. § 3582(c)(2) and therefore with § 1B1.10 of the Guidelines Manual.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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AMICUS CURIAE BRIEF

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IN THE

Supreme Court of the United States

PERCY DILLON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari
To the United States Court of Appeals
For the First Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

(i) Whether the Federal Sentencing Guidelines are binding when a district court imposes a new sentence pursuant to a revised guideline range under 18 U.S.C. § 3582.

(ii) Whether during a § 3582(c)(2) sentencing, a district court is required to impose sentence based on an admittedly incorrectly calculated guideline range.

These issues necessarily encompass a full examination of whether, and to what extent, a criminal defendant is entitled to individualized consideration during re-sentencing.

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BRIEF OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to defending and promoting free enterprise, individual rights, and a limited and accountable government. To that end, WLF regularly initiates litigation, files *amicus curiae* briefs, and publishes monographs and other publications on these and other related topics.

Since the U.S. Sentencing Commission's establishment approximately twenty-five years ago, WLF has submitted comments to and has testified before the Commission on several occasions regarding the promulgation and application of its guidelines. WLF has also taken the Commission and its advisory committees to task for failing to operate in an open and transparent manner in the formulation of official Commission policy. *See, e.g., Wash. Legal Found. v. U. S. Sentencing Comm'n*, 89 F.3d 897 (D.C. Cir. 1996); *Wash. Legal Found. v. U. S. Sentencing Comm'n*, 17 F.3d 1446 (D.C. Cir. 1994).

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[1] Pursuant to Supreme Court Rule 37.6, WLF states that no counsel for either party authored any part of this brief; and that no person or entity, other than WLF and its counsel, provided financial support for the preparation and submission of this brief. By letters filed with the Clerk of the Court, all parties have consented to the filing of this brief.

In addition, WLF has regularly appeared before this and numerous other federal and state courts to address issues of great importance related to the U.S. Sentencing Commission and the Federal Sentencing Guidelines, and to oppose the application of the Guidelines in cases that would result in the imposition of excessively harsh prison sentences. *See, e.g., Gall v. United States*, 552 U.S. 38 (2007); *United States v. Rita*, 551 U.S. 338 (2007); *United States v. Booker*, 543 U.S. 220 (2005).

WLF has no direct interest, financial or otherwise, in the outcome of this case. WLF submits this brief solely to urge individualized consideration of defendants in all federal sentencings, including re-sentencings. All parties have consented to the filing of this brief, and written letters of consent have been lodged with the Court.

STATEMENT OF THE CASE

In the interest of brevity, WLF hereby adopts and incorporates by reference the Statement of the Case contained in Petitioner's brief.

SUMMARY OF THE ARGUMENT

This case essentially asks what 18 U.S.C. § 3582 means during re-sentencing and, depending upon that answer, whether the present re-sentencing scheme satisfies *Booker*. In short, this Court need not reach the *Booker* issue for two reasons. First, Congress has repeatedly made clear through statute that any federal sentencing procedure requires the individualized consideration of defendants. Section 3582 should not be construed to allow a policy statement to trump these

statutory provisions. Second, any doubt about § 3582's meaning should be resolved in favor of allowing individualized discretion during re-sentencing, because the alternative construction raises colorable constitutional issues. The end result—requiring individualized consideration during re-sentencing—would be part of the denouement of an historical detour that temporarily demoted individualized consideration in noncapital cases.

The opinion below approves a practice under which criminal defendants who receive a re-sentencing based on retroactive guidelines are barred from raising any issues other than the guideline change. There is no direct statutory basis for this practice; rather, this limitation is contained in a sentencing guideline policy statement and, in turn, 18 U.S.C. § 3582(c)(2) notes that re-sentencings should be "consistent" with such policy statements. Petitioner's brief properly describes this practice as a violation of this Court's holding in *United States v. Booker*, 543 U.S. 220 (2005).

Amicus Washington Legal Foundation writes to supplement this argument by establishing that the re-sentencing approved by the Third Circuit not only violates *Booker*, but also runs contrary to Congress's explicit directions in 28 U.S.C. § 991(b), 18 U.S.C. § 3553(a)(2), and 18 U.S.C. § 3661, all of which specifically direct that a sentencing practice should allow for some measure of individualized consideration of the defendant. For example, 18 U.S.C. § 3661 instructs that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence." No sentencing

guideline policy statement can trump such clear Congressional guidance.

While applying *Booker* to the procedure approved by the Third Circuit would prove fatal to that procedure, it is not necessary to take that step. Because Congress, by statute, already forbids that procedure and because the procedure approved below raises colorable constitutional issues, the doctrine of constitutional avoidance directs that 18 U.S.C. § 3582(c)(2) should be interpreted as requiring district courts to give weight only to policy statements that comport with congressional directives expressed through statute (such as the directives described above, which require that individualized consideration be a part of every sentencing process). To do otherwise is to wade needlessly into the swamp of at least two colorable constitutional questions. First, it leads to the Sixth Amendment issue identified in *Booker*. Second, it introduces serious questions about the authority and wisdom of delegating to an administrative body Congress's ability to define the jurisdiction of the courts.

The Constitution of the United States, as part of a broader theme of protecting the individual against government power, gives repeated expression to the value of individualized consideration in creating and recognizing checks on that power through the warrant requirement, the grand jury, the right to trial by jury, the "cruel and unusual" clause of the Eighth Amendment, and the pardon power. Giving 28 U.S.C. § 991(b), 18 U.S.C. § 3553(a), and 18 U.S.C. § 3661 their plain meaning in the case at bar will not only be consistent with the will of Congress, but in harmony with a deep vein of American legal thought stretching back to the framers, who firmly grasped the importance of the

individualized consideration of criminal defendants as a check on government power.

ARGUMENT

I. CONGRESS HAS DIRECTED THAT ANY SENTENCING PRACTICE (SUCH AS A RE-SENTENCING) MUST ALLOW FOR AN INDIVIDUALIZED CONSIDERATION OF THE DEFENDANT

The opinion below asserts that there are separate and wildly different standards for sentencings and re-sentencings. The Third Circuit held that *Booker* applies only to "full" sentencing hearings, which must give play to all the factors in 18 U.S.C. § 3553(a), while re-sentencings on retroactive guideline changes cannot include any individualized consideration of the defendant. *United States v. Dillon*, 572 F. 3d 146 (3d Cir. 2009). This bifurcation is based only indirectly on statutory authority: 18 U.S.C. § 3582(c)(2) notes that re-sentencing practice should be "consistent" with policy statements made by the sentencing commission, and a sentencing commission policy statement (U.S.S.G. 1B1.10(a)) suggests that re-sentencings be limited to considering only the effect of the change in the guidelines.

Not only does the opinion below misconstrue the impact of *Booker* (as set out in other briefs), but by rejecting absolutely any individualized consideration of the defendant, the sentencing practice approved by the court below sharply conflicts with Congress's express directives in 28 U.S.C. § 991(b), 18 U.S.C. § 3553(a)(2), and 18 U.S.C. § 3661.

In contemporary federal criminal practice, both a sentencing and a re-sentencing under 18 U.S.C. § 3582 involve the federal sentencing guidelines. In fact, the government's point in the case at bar seems to be that a re-sentencing such as that Percy Dillon received is *only* about the guidelines. Thus, it is appropriate to look first to the statute through which Congress gave explicit instructions to the Sentencing Commission regarding the shape and nature of a sentencing-guideline system.

A. 28 U.S.C. § 991(b) Establishes That The Sentencing Commission Exists To Create Policies And Practices That Embrace 18 U.S.C. § 3553(a)(2) And Permit "Individualized Sentencing."

Congress's directives to the Sentencing Commission in creating guidelines are plainly stated in 28 U.S.C. § 991(b):

> The purposes of the Unites States Sentencing Commission are to establish sentencing policies and practices for the Federal criminal justice system that assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code [and to] provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct *while maintaining sufficient flexibility to permit individualized sentences when warranted* by mitigating or

> aggravating factors not taken into account in the establishment of general sentencing practices . . . .

28 U.S.C. § 991(b) (emphasis added). Because re-sentencings are a "sentencing practice," and because the questions at the heart of this case involve "sentencing policy," 28 U.S.C. § 991(b) is indeed the right place to find Congress's expressed intent.

That statute sets out two directives that are particularly important to this case: First, 18 U.S.C. § 3553(a) guides any sentencing proceeding under the guidelines; and second, even apart from the provisions of § 3553(a), any guideline sentencing must "permit individualized sentences" when warranted. Importantly, this guidance applies whether or not *Booker* controls re-sentencing–the applicable statutes themselves direct that individualized consideration of the defendant be a part of re-sentencing.

28 U.S.C. § 991 requires the Sentencing Commission to establish sentencing processes that "assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18 . . . ." In turn, § 3553(a)(2) expressly sets out that a sentencing court "shall consider" the degree to which the sentence imposed reflects the four traditional goals of sentencing: punishment (Section 3553(a)(2)(A)), deterrence (Section 3553(a)(2)(B)), incapacitation (Section 3553(a)(2)(C)), and rehabilitation (Section 3553(a)(2)(D)). Each of these traditional goals are necessarily predicated on the individual characteristics of the defendant. The appropriateness of incapacitation or rehabilitation, for example, will often depend on the circumstances of the defendant at the time of re-sentencing, which may occur

years or decades after conviction.

Because Congress has directed that the Sentencing Commission create sentencing systems that expressly mandates some consideration of the four traditional goals of sentencing, the Third Circuit's restrictive view of re-sentencing must be rejected as contrary to the will of Congress as expressed in statute.

B. 28 U.S.C. § 991(b)(1)(B) And 18 U.S.C. § 3661 Expressly Require That Re-sentencing Include Individualized Consideration Of The Defendant.

The guideline system was created pursuant to the Sentencing Reform Act of 1984. Both 28 U.S.C. § 991(b) and the present version of 18 U.S.C. § 3661 resulted from the SRA. The terms of both § 991 and § 3661 directly prohibit the creation of a sentencing practice that bars individualized consideration of defendants. Although mandatory guidelines were tolerated under these statutes, those guidelines also contained tools for flexibility—departures—which are absent in the re-sentencing mechanism approved by the Third Circuit. Without departures, the process of re-sentencing described in the opinion below fails to fulfill the expressed will of Congress.

1. 28 U.S.C. § 991(b)(1)(B)

Even beyond its reference to 18 U.S.C. § 3553(a)(2), § 991(b)(1)(B) itself directly calls on the Sentencing Commission to mandate individualized consideration, instructing that sentencing policies and practices must "maintain sufficient flexibility to permit individualized sentences when warranted by mitigating

or aggravating factors not taken into account in the establishment of general sentencing practices."

With its reference to "factors not taken into account in the establishment of general sentencing practices," this provision seems to be describing the departure provisions that were a central feature of federal sentencing before *Booker* and are still a part of the guidelines. In other words, § 991 seems to be requiring on its face at least the flexibility contained in the mandatory guidelines prior to *Booker*.

The re-sentencing practice approved below does not meet that requirement. Rather, under the view of the Third Circuit, re-sentencings are restricted to simply adjusting offense levels to fit retroactive changes and do not allow for departures or any equivalent. Without the ability to depart or otherwise give effect to individual considerations, re-sentencings as described by the Third Circuit not only fail to satisfy the requirements of *Booker*, but contravene the dictates of 28 U.S.C. § 991(b).

2. 18 U.S.C. § 3661

Like § 991(b), the text of 18 U.S.C. § 3661 plainly requires that some form of individualized consideration be available to the district-court judge during any form of sentencing: "No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purposes of imposing an appropriate sentence."

This language is unequivocal. Congress has barred the Sentencing Commission, by statute, from doing exactly what it has attempted to do here—forbid a

sentencing judge from considering "the background, character, and conduct" of a defendant. The language of the statute is quite specific in defining the proceedings covered (where a "court of the United States" is called upon to impose "an appropriate sentence"), and re-sentencing fits well within that definition. Thus, the Third Circuit's restrictive view of re-sentencing conflicts with the will of Congress as expressed multiple times in the federal code.

Taken together, 28 U.S.C. § 991(b), 18 U.S.C. § 3553(a)(2), and 18 U.S.C. § 3661 deny the Sentencing Commission the authority to wholly remove individualized consideration from a sentencing practice. Although 18 U.S.C. § 3582(c)(2) acknowledges that re-sentencings must be "consistent" with the Commission's policy statements, that does not somehow allow the Commission to write enforceable policy statements that conflict with Congress's direct commands as expressed through statute. *See* 28 U.S.C. § 994(a)(2) (requiring that general policy statements further the purposes of § 3553 (a)(2)). Because the policy statement at issue here (United States Sentencing Guideline § 1B1.10(a)) does not allow for any form of individualized consideration of a defendant, it runs contrary to statute and thus is invalid.

II. THE CANON OF CONSTITUTIONAL AVOIDANCE REQUIRES THIS COURT TO CHOOSE THE INTERPRETATION OF 18 U.S.C. § 3582(c)(2) THAT WOULD NOT ARGUABLY VIOLATE *BOOKER* OR NONDELEGATION PRINCIPLES

The Third Circuit below held that, despite the

above-discussed statutory endorsements of individualized consideration, § 3582(c)(2) authorizes the Sentencing Commission, through general policy statements, to block district courts from engaging in any individualized consideration of criminal defendants at re-sentencing hearings. The court reached this conclusion by reading the language of § 3582(c)(2) as a delegation of authority to the Sentencing Commission to make binding law with sufficient force to carve out an exception to principles enshrined in statutes passed by Congress. This interpretation of § 3582(c)(2) raises serious constitutional questions under *Booker* and principles of non-delegation, and should be avoided in favor of a reasonable, constitutionally sound alternative. The Court should avoid these constitutional questions, by interpreting § 3582(c)(2) as requiring district courts to give persuasive weight *only* to policy statements that are otherwise consistent with Congress's statutes that govern sentencing.

The cardinal principle of constitutional avoidance is relevant here because the Third Circuit's interpretation of § 3582(c)(2) raises a constitutional question under *Booker*. The rule of constitutional avoidance holds that when a statute is reasonably susceptible of two constructions and one construction raises serious constitutional questions, a court has a "duty" to adopt the interpretation that avoids the constitutional issue. *Jones v. United States*, 526 U.S. 227, 239 (1999). This doctrine ensures that Congress must speak clearly before the Court attributes a constitutionally questionable purpose to its words. The Third Circuit's interpretation raises a *Booker* question because it effectively makes the sentencing guidelines mandatory at re-sentencing. As other briefs before this Court discuss, there is a serious question whether the

Sixth Amendment requires individualized consideration of criminal defendants at re-sentencing hearings. Thus, assuming § 3582(c)(2) is susceptible to a constitutionally-sound alternative, this Court is duty-bound to adopt that alternative interpretation.

The Third Circuit's interpretation also raises the specter of constitutionally improper delegation. The decision below interprets §3582(c)(2) as giving the Sentencing Commission discretion, untethered from statutory principles, to control district-court subject-matter jurisdiction in re-sentencings. Courts adopting the Third Circuit's approach have held that they *lack jurisdiction* to sentence below amended sentencing guideline minimums. *See United States v. Dillon*, 572 F.3d 146 (3rd Cir. 2009) ("[T]he District Court found that Booker did not apply and that it lacked *jurisdiction* to grant more than a 2-level sentence reduction.") (emphasis added); *United States v. Savoy*, 567 F. 3d 71 (2d Cir. 2009); *United States v. Dunphy*, 551 F. 3d 71 (4th Cir. 2009). The Constitution specifically grants Congress the power to create federal courts and therefore to define their jurisdiction. *See* Article I, § 8; *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). Under the Third Circuit's interpretation, however, Congress is understood to have delegated to the Sentencing Commission broad authority to control the jurisdiction of Article III courts in re-sentencing hearings.

This delegation raises a colorable constitutional question. Congressional authority to delegate is not boundless. *A. L. A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). While this Court has been reluctant to strike down delegations, it has readily avoided interpretations of statutes that would create constitutionally questionable delegations. *See Indus.*

Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 645 (1980); *Nat'l Cable Television Ass'n Inc. v. United States*, 415 U.S. 336, 342 (1974).

Further, this Court has never considered a case where Congress specifically delegated its *jurisdiction*-defining power. There is reason to believe delegations of jurisdiction-defining power are more suspect than delegations of other types of lawmaking power. *United States v. Mitchell*, 18 F.3d 1355, 1360 n. 7. (7th Cir. 1994) ("[O]ne can readily distinguish between Congress' ability to delegate its commerce power over price controls during wartime . . . and its ability to delegate a power as sensitive and central to our Anglo-American legal tradition as shaping a federal court's jurisdiction."). Here, an agency with no experience in such matters and— according to the Third Circuit's interpretation— no relevant guiding statutory principles, has been empowered to define the subject-matter jurisdiction of Article III courts. Contrary to the interpretation adopted by the Third Circuit, unless standards from other statutory sections are read in, § 3582(c)(2) does not provide principles sufficient to channel the Commission's decisions. Thus, this Court should adopt an interpretation of § 3582(c)(2) that avoids this constitutionally questionable delegation.

A reasonable and constitutionally sound interpretation *is* available. The constitutional problems described above are eliminated when § 3582(c) is read to require federal courts to give authoritative weight (rather than binding force) to policy statements, and only if those statements are consistent with other congressional directives contained in sentencing statutes. Thus, rather than giving the Sentencing Commission the ability to effectively write re-sentencing jurisdictional

statutes that trump other statutory provisions, § 3582(c) should be understood to require federal courts to consider sentencing commission policy statements regarding re-sentencing only if those policy statements are consistent with other statutory principles, including the above-discussed provisions enshrining principles of individualized consideration.

Although the Third Circuit insisted that § 3582(c) made policy statements binding upon district courts, a less aggressive reading is reasonable. After *Booker*, the baseline presumption must be that policy statements, like the guidelines themselves, are advisory rather than binding. *Cf.* S. Rep. No. 225, 98th Cong., 1st Sess. 37-150, at 167-68 (stating that no appeal will be available when a sentence is merely "inconsistent with policy statements"). The text of § 3582(c) is not sufficiently strong to definitively reverse this presumption. It requires only that, before granting a reduction, district courts ask whether a reduction "is consistent with" any "applicable" policy statements. The statute suggests that this consideration takes place in the context of a discretionary decision. 18 U.S.C. § 3582(c)(2) ("[T]he court may reduce . . . ."). Further, an identical "consistent with policy statements" clause also appears in § 3582(c)(1), where it clearly seems to mean that the district court should use the Commission's policy statements only as advisory guides to its discretionary decision. Additionally, the legislative history is consistent with an advisory reading. *See, e.g.*, S. Rep. No. 225 at 55-56 ("The bill, as reported, provides . . . in 18 U.S.C. § 3583(c) for *court determination*, subject to *consideration* of Sentencing Commission standards, of the question whether there is justification for reducing a term of imprisonment in situations such as those described.") (emphasis added).

Section 3582(c)(2)'s language and legislative history are susceptible to the interpretation that Congress intended to create a place in the re-sentencing process for the Commission to provide guidance that must be carefully considered by federal courts. It is not clear enough to give an otherwise advisory policy statement independent binding force, especially where—as here—doing so would raise two constitutional questions.

Properly interpreted as an advisory policy guideline, rather than an adopted standard, Guideline § 1B1.10 does not trump the above-discussed statutory provisions in which Congress stressed individualized consideration. Because § 1B1.10 conflicts with other statutory provisions, it should have neither binding nor persuasive authority. Policy statements are invalid if they are inconsistent with federal statutory law. *See Stinson v. United States*, 508 U.S. 36, 38 (1993). Section 1B1.10, which purports to prevent federal courts from considering any sentencing factors that would bring a sentence below a guideline minimum, conflicts with the provisions of federal law discussed in Part I. Importantly, it conflicts with the very mandate provided to the Sentencing Commission in § 991(b)(1)(B) that, in forming its policies it must create "sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors not taken into account in the establishment of general sentencing practices." While § 3582(c)(2) was clearly intended to give the Sentencing Commission an opportunity to influence what sentencing factors should be relevant at re-sentencing, its language should not be read to override the statutory requirements that individualized consideration be an important tenet of the sentencing

guideline framework. Reading section 3582(c)(2)'s grant of power to the Sentencing Commission in light of other statutory principles avoids a potential *Booker* problem and provides a guiding principle that alleviates non-delegation concerns.

III. IN THE WAKE OF *BOOKER*, THE VALUE OF INDIVIDUALIZED CONSIDERATION AS EXPRESSED IN THE GOVERNING STATUTE, THE CONSTITUTION, AND THE PRIOR OPINIONS OF THIS COURT, MUST BE OF PARAMOUNT IMPORTANCE WHEN CONSIDERING RE-SENTENCINGS

The question before this Court presents an opportunity to complete an important historical arc. For about two hundred years, from the founding of the Republic until 1987, the individual consideration of defendants was a guiding principle of American criminal law. It is enmeshed in the Constitution (discussed in subsection (a) below), reflected in the opinions of this Court (subsection (b)), and even informs the statute that established the Sentencing Commission and guides the inquiry here (as set out in section I, *supra*). But the mandatory-guideline era of 1987-2005 was an historical anomaly during which the value of individualized consideration was, to a large (though not total) degree, obscured in favor of uniformity.

Booker reversed that historical anomaly. By making the guidelines advisory and requiring a "reasonableness" standard on review, this Court recognized that post-*Booker* sentencing would not "provide the uniformity that Congress originally sought to secure." 543 U.S. at 263. Given the tension that

exists necessarily between uniformity and individualized consideration, this "letting go" of a certain amount of uniformity marked a return to the deep vein of American law that recognizes the importance of individualized consideration, a principle lauded even by the language of the Sentencing Reform Act itself.

In *Booker*, this Court expressly invited Congress to adjust the longstanding historical balance between individualized consideration and uniformity:

> Ours, of course, is not the last word: The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long term, the sentencing system, compatible with the Constitution, that Congress judges best for the federal system of justice.

543 U.S. at 265. In the five years since *Booker* was announced, Congress has declined this invitation to re-impose mandatory guidelines or assure uniformity by another means.

The statutes and canons discussed above stand on their own as arguments against the opinion below, as their language bars the sentencing practice at issue here, or at least raises an ambiguity worthy of avoidance resolution. Nonetheless, it is worth noting that by giving effect to the value of individual consideration at re-sentencing, those statutes may play a role in a broad historical correction that will bring federal non-capital sentencing into alignment with the imperatives of the Constitution, the decisions of this Court in capital litigation, and the broad sweep of 200 years of American legal thought, all of which consistently have supported

the individual consideration of criminal defendants as part of a broader bulwark against the potential abuses at the hands of an otherwise overwhelmingly powerful federal government.

A. The United States Constitution Broadly Requires Individualized Consideration Of Defendants Throughout The Criminal Case.

The Constitution itself mandates several aspects of criminal procedure that exist primarily to require consideration of the individual characteristics of the accused or convicted. Given the Constitution's consistent theme of safeguarding the individual against the power of the federal government, this focus is unsurprising. These constitutional provisions require individual consideration of defendants during investigation, when bringing a charge, at trial, at sentencing, and throughout the post-conviction process.

Even before a charge is brought, the Constitution insists on individual consideration of the defendant. The Fourth Amendment's probable-cause requirement reflects not only the need to limit police power, but also the need to do so with regard for the individual circumstances of the target of the investigation. The Constitution's call for particularized warrants was in large part a reaction to the general writs assistance that were used by British authorities in colonial America and that authorized the King's agents to search wherever they thought they might find evidence. *See* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 54 (1937). Such breadth outrages us today precisely because we expect that more specific consideration should be

required before liberty is deprived. Today, the discretion given to a magistrate in considering probable cause embodies the Constitution's central value of considering the individual circumstances of criminal defendants in the face of the overwhelming power of the federal government, but it is not the only one.

The Fifth Amendment's requirement of indictment by grand jury also reflects the value of individualized consideration, specifically in the charge. The convening of twenty-three citizens to consider indictments is designed not for efficiency, but rather to ensure that a formal criminal charge is based on a careful examination of the particular circumstances of the case. For 150 years, this high and inefficient level of scrutiny of particularized facts was seen as so important, in fact, that indictment by the grand jury could not be waived in federal court.[2]

At trial the defendant's Sixth Amendment right to a jury similarly reflects individual rights that attribute individualized circumstances significant importance within the criminal process. Like the Grand Jury, one advantage of a trial by jury is the ability of many people acting together to have a more contextual view of the specific facts relating to the defendant and the crime alleged. At sentencing as well, the Eighth Amendment requires individualized consideration of defendants (as discussed in the next section).

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[2] Only with the adoption of Federal Rule of Criminal Procedure 7's waiver provision was a defendant who decided to plead guilty provided the option to forgo indictment. *See* Roger A. Fairfax, Jr., *The Jurisdictional Heritage of the Grand Jury Clause*, 91 Minn. L. Rev. 398, 400 (2006).

Finally, post-trial practices mandated by the Constitution once again require evaluation of individual circumstances. By including both habeas corpus and the pardon power among the criminal processes recognized in the Constitution, the Framers repeatedly valued the individual circumstances of the defendant over efficiency. These processes allow a third and fourth review of the specific facts of a case (after trial and appeal), an extraordinary number of reviews that makes sense only as a part of the broader project of protecting individual rights through a constant attention to individualized circumstances.

B. Requiring Individualized Consideration During Re-sentencing Reduces The Unjustifiable Disparity In Treatment Of Capital And Noncapital Defendants.

Individualized consideration plays a constitutionally mandated role in capital sentencing. After a splintered decision from this Court outlawed the death penalty as it was then administered in the United States, *Furman v. Georgia*, 408 U.S. 238 (1972), states attempted to remedy their capital processes. It soon became clear that to survive Eighth Amendment scrutiny, a state's capital process would have to give "the individual . . . his due." *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982). Mandatory capital sentences violated the Eighth Amendment precisely because they "treat all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

Robust debate exists regarding whether the Eighth Amendment should be read to insist on individualized consideration even in the noncapital context. As Professor Barkow asked: "Why can defendants be treated as 'a faceless, undifferentiated mass' when they received a term of imprisonment" instead of a death sentence? Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 Mich. L. Rev. 1145, 1178 (2009). In noncapital cases, just as much as in capital cases, it is relevant that "the belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender." *Williams v. New York*, 337 U.S. 241, 247 (1949). Further, given that the political process focuses disproportionately on death sentences, strong arguments can be made that noncapital sentences will receive little meaningful consideration if not from the Court. *Id.* at 1166-67. Although it is now reasonably settled that mandatory noncapital sentences are *constitutionally* acceptable even without individualized discretion, this Court has not always taken this view, *Solem v. Helm*, 463 U.S. 277, 291 n.17 (1983) (recognizing, in a noncapital case, "the inherent nature of our federal system and the need for individualized sentencing."), and there certainly are valid reasons why a legislature might choose to emphasize individualized sentencing over uniformity. *Harmelin v. Michigan*, 501 U.S. 957, 1007 (1991) (Kennedy, J, concurring).

When Congress's choice to mandate individualized consideration is taken seriously, the historical correction becomes apparent. No longer is the disparity so complete between capital and noncapital sentencing–individual consideration matters for all individuals sentenced,

though such consideration is only constitutionally compelled in capital cases. Nor is there a sentencing scheme that allows (indeed requires) individualized consideration during preliminary sentencing but that forbids it during re-sentencing. Instead, sentencing and re-sentencing individuals to death or prison will involve individual consideration. This rule draws from one of the deepest of American social impulses, which is an abiding respect for the individual in relation to government. In keeping with statute, doctrines of interpretation, and that primal impulse, no law should forbid individual consideration while directing the sentencing of an individual.

CONCLUSION

For all of these reasons, as well as those raised in Petitioner's brief on the merits, *amicus curiae* requests that this Court reverse the opinion of the court of appeals.

Respectfully submitted,

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